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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

LI. VICTORIÆ.

COCH *v.* ALLCOCK & CO.

1888
May 2.

Practice—Evidence Abroad—Commission—Rules of Supreme Court, 1883, *Order* XXXVII., *r.* 5.

Where material witnesses are resident abroad the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence, does not disentitle such party to an order for a commission.

Lawson v. *Vacuum Brake Company* (27 Ch. D. 137) explained.

APPEAL from Chambers.

The action was brought by the plaintiff, who was a Norwegian, to recover the price of ice shipped in Norway and delivered in England. The amount in dispute was between 20*l.* and 30*l.* The plaintiff applied under Order XXXVII., r. 5, for an order for a commission to Brevig in the south of Norway to obtain the evidence of the persons whom he had employed in shipping the ice.

The Master made an order for a commission, which was reversed by Denman, J.

The plaintiff appealed.

Meek, for the plaintiff. The commission ought to be granted. It is important to shew the condition in which the ice was

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COCH v. ALLCOCK & CO.

shipped, and this can best be shewn by the evidence of those who shipped it.

Butler Aspinall, for the defendants. The plaintiff is not entitled to a commission, for he has not shewn that he cannot bring the witnesses to this country: *Lawson* v. *Vacuum Brake Company*. (1) On the contrary they are in his employment, and therefore under his control.

FIELD, J. I am of opinion that a commission ought to issue.

The old rule which has governed the practice of the Courts for the last fifty years is not affected by the decision in *Lawson* v. *Vacuum Brake Company*. (1) It is almost a matter of course in ordinary cases that if a party swears that the evidence of the witnesses whom he seeks to examine is material a commission will be granted. There is this important exception, that if the party himself wants to be examined, and the circumstances are such as to make it apparent that it is important that the evidence proposed to be given should be subject to the test of strict cross-examination, and for that purpose his presence in Court is necessary, that, in the discretion of the Judge, may be a ground for refusing an order for a commission. This view of the law is supported by the decisions in *Berdan* v. *Greenwood* (2) and *Crofton* v. *Crofton*. (3)

In the present case I think the plaintiff is fairly entitled to an order for a commission.

It is urged on behalf of the defendants that because the witnesses whom the plaintiff seeks to examine are persons in his own employment he can bring them to this country, and a commission is therefore unnecessary. But it is not shewn that he has any power to compel the witnesses to come here, and, even if he had, the expense of bringing them over would necessarily be very great.

WILLS, J. I am of the same opinion altogether.

I can see no reason why these witnesses should not be examined in Norway, and I should say nothing more if it were not that the

(1) 27 Ch. D. 137. (2) 20 Ch. D. 764, note (3).
(3) 20 Ch. D. 760.

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decision in *Lawson* v. *Vacuum Brake Company* (1) has been misunderstood.

The statement of that case in the head-note to the report is inaccurate and incomplete—always an unfortunate circumstance, inasmuch as treatises and text-books so often go no deeper than head-notes. The decision proceeded on the ground that the witness whom it was sought to examine had been a party to the transactions which the plaintiff was seeking to impeach on the ground of fraud. He had since become friendly to the plaintiff, and was now willing to turn approver and give evidence against those whom he alleged to be his associates in fraud. If ever there could be a case for refusing to examine a witness upon commission, it would be that one in which such a person was the principal witness, and in such a case, therefore, if the plaintiff desired to have him examined upon commission, it lay upon him to make out that it was impossible to bring him to this country.

Appeal allowed.

Solicitors for plaintiff: *Turnbull, Tilly, & Mousir.*
Solicitors for defendants: *Wilson & Son.*

P. B. H.

MULLENEISEN *v.* COULSON AND ANOTHER (No. 2).

May 12, 14.

Practice—Prohibition—Proceedings on Crown Side of Queen's Bench Division—Proceeding as Pauper—Rules of Supreme Court, 1883, *Order* XVI., *r.* 22; *Order* LXVIII., *rr.* 1, 2.

A party to proceedings on the Crown side of the Queen's Bench Division cannot be admitted to proceed as a pauper.

APPEAL from chambers.

The action, which was for illegal distress, was originally brought in the Queen's Bench Division against the defendant Coulson alone, and was remitted to the Clerkenwell County Court under s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). The County Court Judge gave the plaintiff leave to amend by adding Strousberg as a defendant, and gave judgment against both defendants.

(1) 27 Ch. D. 137.

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MULLENEISEN v. COULSON (No. 2.)

The defendant Strousberg applied for and obtained an order for a prohibition to prohibit all further proceedings against him on the judgment, and this order was affirmed by Manisty and Hawkins, JJ. (1)

The plaintiff appealed from the order of the Divisional Court, and on April 10, 1888, applied for, and obtained from the Master, an order ex parte admitting him to proceed with his appeal as a pauper.

On April 14 the Master, on the application of the defendant Strousberg, rescinded the ex parte order of April 10.

The plaintiff appealed from the order of April 14 to Denman, J., who referred the matter to the Court.

G. S. Bower, for the defendant Strousberg. The only jurisdiction to admit parties to proceed as paupers is that given by Order XVI., r. 22, which, by Order LXVIII., rr. 1, 2, does not apply to proceedings on the Crown side of the Queen's Bench Division, and therefore not to prohibition. There is no similar provision in the Crown Office Rules, 1886.

[He referred to *Holden* v. *Holden* (2); *Harlock* v. *Ashberry* (3); *Eden* v. *Weardale Iron and Coal Co.* (4); 1 Daniell's Chancery Practice, p. 165, 6th ed.; 11 Hen. 7, c. 12. (5)]

Overend, for the plaintiff.

CAVE, J. I am of opinion that this appeal ought to be dismissed.

The action was originally brought in the High Court against Coulson alone, and remitted to the County Court under s. 10 of the County Courts Act, 1867. The Judge of the County Court gave leave to add Strousberg as a defendant without his consent, and gave judgment against him. A motion was made to prohibit all proceedings on the judgment against Strousberg, and the Divisional Court made an order affirming an order for a prohibition. (1) The plaintiff has appealed against the order of the Divisional Court, and desires to be admitted to prosecute his appeal in formâ pauperis.

(1) 20 Q. B. D. 667.
(2) W. N. 1868, p. 180.
(3) 19 Ch. D. 84.
(4) 28 Ch. D. 333.
(5) Repealed by 46 & 47 Vict. c. 49.

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MULLENEISEN v. COULSON (No. 2.)

On April 10 the Master made an ex parte order admitting the plaintiff to proceed in formâ pauperis. On April 14 the Master made a further order, rescinding his ex parte order of the 10th, and on appeal by the plaintiff against the Master's second order Denman, J., referred the matter to the Court.

I am of opinion that there is no power to admit this appellant to appeal in formâ pauperis from the order of the Divisional Court granting a prohibition. Mr. Overend was compelled to admit that he could find no precedent prior to the Rules of the Supreme Court, 1883. The question, therefore, must depend upon whether the case comes within Order XVI., r. 22, of those rules. Whatever the extent and construction of that rule may be, it seems to me perfectly clear that by the express terms of Order LXVIII., rr. 1, 2, Order XVI. does not apply to proceedings on the Crown side of the Queen's Bench Division. Therefore Order XVI., r. 22, does not help the appellant, and as he can shew no precedent, independently of the rules, for the order for which he applies, it follows that he must fail. The Crown Office Rules contain no provision for appealing in formâ pauperis, and if such a practice were introduced on the Crown side it is difficult to see where it would stop. It can never have been intended that a defendant to an indictment or information in the Queen's Bench Division should be entitled to be admitted to defend in formâ pauperis, and have counsel and solicitor assigned to him.

For these reasons I am of opinion that the ex parte order admitting the appellant to proceed as a pauper was improvidently made, and that the subsequent order rescinding it was right.

A. L. SMITH, J. I am of the same opinion.

The action having been remitted to the County Court, the County Court Judge thought Strousberg ought to be made a party, and gave judgment against him. Strousberg applied for a prohibition, which was granted, and the plaintiff is appealing against the order granting the prohibition, and he now wants to go to the Court of Appeal as a pauper. I put no construction on the words of Order XVI., r. 22, for it is admitted that unless that rule can be made applicable the plaintiff cannot prosecute his appeal as a pauper. But Order LXVIII., r. 1, expressly provides that

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Order XVI., r. 22, shall not affect the procedure or practice in proceedings on the Crown side of the Queen's Bench Division, and this is a proceeding on the Crown side. The Master, therefore, was right in rescinding by his order of April 14 the wrong ex parte order of April 10.

Appeal dismissed.

Solicitor for plaintiff: *G. W. Churchley.*
Solicitor for defendant Strousberg: *W. Mitchell.*

P. B. H.

May 3.

HEWITSON AND MILNER *v.* FABRE.

Practice—Service out of Jurisdiction—Defendant Foreigner residing Abroad—Service of Writ on Defendant—Nullity—Order XI., r. 6; Order LXX., rr. 1, 2.

By Order XI., r. 6, "when the defendant is neither a British subject nor in British dominions, notice of the writ and not the writ itself is to be served upon him."

The plaintiffs sued the defendant, who was a foreigner residing in France, for goods sold and delivered to him in England, and obtained a judge's order for the service upon him of the writ out of the jurisdiction, the order being obtained upon an affidavit which stated erroneously that the defendant was a British subject. The writ was served upon the defendant in France, and judgment signed against him in default of appearance:—

Held, that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside.

SUMMONS to set aside a judgment obtained against the defendant in default of appearance, referred by a judge at chambers to the Court.

In September, 1887, the plaintiffs issued a specially indorsed writ for service out of the jurisdiction for the balance of an account for goods sold and delivered in England to the defendant, who resided at Bordeaux, in France. The plaintiffs obtained leave ex parte from Kekewich, J., to serve the writ upon the defendant out of the jurisdiction upon an affidavit which stated in good faith, though erroneously, that the defendant was a British subject. The writ was served upon the defendant at Bordeaux on

December 24, and no appearance being entered on his behalf the plaintiffs on January 7, 1888, signed judgment against him. Proceedings upon the judgment having been taken by the plaintiffs in the French Courts, the defendant took out a summons to set aside the judgment and all proceedings thereon upon the ground that the service of the writ was a nullity, he being a French subject resident abroad. At the hearing before the master it was admitted by the plaintiffs that the defendant was not a British subject. The master dismissed the application, and the defendant appealed to the judge, who referred the matter to the Court. (1)

Stephen Lynch, for the defendant. Apart from the provisions of Order XI. there is no power in the Court to order service out of the jurisdiction. The language of r. 6 of that Order is explicit, and was used in confirmation of the decisions under the old rules in *Padley* v. *Camphausen* (2); *Westman* v. *Aktiebolaget Ekmans Mekaniska Fabrik.* (3) The order for service of the writ on the defendant was obtained by a wrong statement of fact, and the service of the writ under that order is wholly void. The order of Kekewich, J., should therefore be set aside as well as the judgment.

H. D. Greene, Q.C., for the plaintiffs. The application which has been refused by the master is to set aside the judgment; but that judgment is valid on the face of it. The order for service of the writ upon the defendant was rightly made by Kekewich, J., upon the materials before him, and it has not been appealed against; the judgment in the action is therefore regular, and cannot be set aside. In *Padley* v. *Camphausen* (2) the procedure itself was wrong, and the judgment could not be right; the order of the Court was not properly carried out, the writ itself being served upon the defendant instead of notice of the writ as directed by the Court; in the present case the order of the judge has been strictly obeyed. In any case the service of the writ is not wholly void, but only an irregularity, and the

(1) By Order XI., r. 6: "When the defendant is neither a British subject nor in British dominions, notice of the writ and not the writ itself is to be served upon him."

(2) 10 Ch. D. 550.

(3) 1 Ex. D. 237.

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defendant is too late in applying for relief; the matter should be dealt with under Order LXX., rr. 1, 2.

FIELD, J. It is contended that the judgment which has been signed against the defendant is warranted by the service upon him of the writ and by his subsequent default of appearance. But the service was at Bordeaux, and the defendant says that he is not a British subject, but a subject of the republic of France, and that, although a notice of the issue of the writ might properly have been served upon him, the service upon him of the writ itself was wholly unwarranted by law. The question is one of great importance, and we must look at the object of the rule which regulates procedure in these matters. The present rule is a modification of the old rule, which provided for the service of writs in Scotland and Ireland, a course which proved so intolerable that many representations were made from those countries that the evil complained of might be remedied.

But the evil is still greater in the case of foreign countries, the governments of which resent the service on their subjects without their leave of the process of the Courts of other nations, and for this reason the alteration has been made in the rule, and a specific distinction between serving the process itself and giving a courteous notice of it has been drawn by Order XI., r. 6. Under that rule, if the defendant be a British subject residing abroad, the jurisdiction which the Courts of this country possess over British subjects wherever resident would authorize the service upon him of the writ; but if he be not a British subject, notice only of the writ is to be given to him, so that he may be under no compulsion to obey it, but may be able to exercise an option in that respect.

It is important to consider whether this objection lies in the mouth of the individual himself. In my opinion it is plain that it does, and that the very object of the rule was to enable him to take such an objection, and I have no doubt whatever that a foreigner residing abroad is competent to complain of the service of British process upon him.

The notice of motion asks that the judgment and subsequent proceedings may be set aside, but we are now asked to set aside

also the service of the writ; I think that this should be done. It is true that the order for service of the writ was made by a judge in chambers, and there can be no doubt that upon the materials before him it was properly made by Kekewich, J., and properly drawn up; but it was made upon an affidavit that the defendant was a British subject, which turns out to be incorrect; had the real facts been before the learned judge he would have made the proper order for service of a notice of the writ. The order having been made upon a misrepresentation (however innocent) of a material fact, I think it should be set aside. It must be remembered also that the defendant was not a party to the making of the order; it was obtained ex parte, and to hold that the defendant cannot now come forward and object to it would amount to a denial of justice. I do not think there is any ground for the contention that the defendant has not come here in proper time; he has come when the necessity arose in consequence of proceedings upon the judgment being taken against him in the French Courts. The proceedings here are void ab initio, and I think the defendant is entitled to the relief which he claims.

WILLS, J. I am entirely of the same opinion. The language of Order XI., r. 6, is perfectly clear and explicit. The defendant was a foreigner residing in a foreign country, and the writ was served upon him abroad. Such a service is no service at all, for it is forbidden by the rules, and unless some act amounting to an estoppel has been done by the defendant, the service is wrong and wholly void. I do not say what might have happened if the defendant had appeared to the writ; he might in such a case have been estopped, as by so doing he would have induced the plaintiff to go on with the action; but I am disposed to say that unless he has done something of that kind the defendant may come at any time and ask to have the writ set aside.

Appeal allowed.

Solicitors for plaintiffs: *Wakeford-May & Woulfe.*
Solicitors for defendant: *Daniel Jones & Linnett.*

W. J. B.

1888
April 10.

HIGGINS *v.* SCOTT.

Practice—Counterclaim—Default in Pleading to—Motion for Judgment on Counterclaim—Order XXVII., *r.* 11.

Where a plaintiff fails to deliver a defence to a counter-claim, and his action is dismissed under a master's order, judgment on the counter-claim can only be signed by the defendant upon a motion for judgment under Order XXVII., r. 11.

THE plaintiff brought an action against the defendant for the price of goods sold and delivered, and the defendant counter-claimed against the plaintiff for a trespass. The plaintiff did not put in a reply and defence to counter-claim, and having failed to comply with the terms of a master's order, his action was dismissed. The defendant now moved under Order XXVII., r. 11, for judgment on the counter-claim. (1)

Macaskie, for the defendant. The effect of Order XXIII., r. 4, is to make the rules of procedure upon default of pleading which are contained in Order XXVII. applicable to the case of the default of a plaintiff in replying to a counter-claim. None of the rules of that order, except r. 11, are applicable to the present case, and the defendant can only get judgment upon his counter-claim by a motion for judgment under that rule. [He referred to the unreported case of *Burckhardt* v. *im Thurm*, cited in the Annual Practice for 1888, p. 379.]

Plaintiff in person.

THE COURT (Pollock, B., and Charles, J.) held, in accordance with the decision in *Burckhardt* v. *im Thurm*, that the application was properly made, and that judgment on the counter-claim could only be signed on motion for judgment under Order XXVII., r. 11.

Judgment for defendant.

Solicitors for defendant: *Taylor, Hoare, & Box.*

(1) By Order XXIII., r. 4: "Where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence."

By Order XXVII., r. 11: "In all other actions than those in the preceding rules of this Order mentioned, if the defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a Judge shall consider the plaintiff to be entitled to."

W. J. B.

DOWNE *v.* FLETCHER AND WIFE.

1888
May 14.

Practice—Married Woman—Judgment against, in respect of Separate Estate—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 12—*Married Women's Property Act* 1870 *Amendment Act* 1874 (37 & 38 *Vict. c.* 50), *s.* 1—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13, 14, 22—*Rules of Supreme Court*, 1883, *Ord.* XIV., *r.* 1.

In an action against husband and wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Women's Property Act 1870 Amendment Act 1874, but before the coming into operation of the Married Women's Property Act, 1882, judgment may be entered against the wife under Order XIV., r. 1, making the debt and costs payable out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott* v. *Morley* (20 Q. B. D. 120, at p. 132), without proof of the existence of separate estate at the date of the judgment.

ACTION against husband and wife for the price of goods supplied to the wife before marriage. The marriage took place in 1881. It was not denied that the goods had been supplied and had not been paid for. On application for judgment under Order XIV., r. 1, the husband had unconditional leave to defend; the plaintiff did not prove that the wife possessed separate estate, and the master for this reason refused to make an order for judgment against her. On appeal the judge at chambers referred the matter to the Court.

E. Morten, for the plaintiff. The plaintiff is entitled to an order for judgment in the form settled by the Court of Appeal in *Scott* v. *Morley*. (1) There cannot be execution unless there is separate estate at the date of execution, but it is not necessary that separate estate should exist at the time of the application in

(1) 20 Q. B. D. 120, at p. 132: "It is adjudged that the plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."

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order to entitle the plaintiff to judgment. [He cited *Bursill* v. *Tanner*. (1)]

McCall, for the female defendant. The judgment in *Scott* v. *Morley* (2) relates to a debt contracted by a wife after marriage, and is in pursuance of s. 1, sub-s. 2, of the Married Women's Property Act, 1882. Here the debt was contracted before marriage, and the marriage took place before the Married Women's Property Act, 1882, came into operation. That Act is not retrospective: ss. 13, 14, 22. The Married Women's Property Act, 1870, applies, and the words of s. 12: "the wife shall be liable to be sued for and any property belonging to her for her separate use shall be liable to satisfy" her debts contracted before marriage, have been interpreted by Cotton, L.J., in *Ex parte Jones, In re Grissell* (3) as meaning "the wife shall be liable to be sued as in equity for the purpose of attaching her separate estate." For this purpose proof was necessary of the separate estate which the wife had charged with the amount due, and whether any of such separate estate existed at the date of the judgment: *Pike* v. *FitzGibbon*. (4) The creditor here is seeking to render the wife liable "as in equity" in respect of a debt contracted before marriage, and, though it cannot be alleged that she has bound her separate estate or any part of it, yet, her liability being proprietary rather than personal, he must prove the existence of separate estate in order to entitle himself to judgment.

E. Morten, in reply.

LORD COLERIDGE, C.J. The plaintiff is in my opinion entitled to judgment against the married woman, with a limitation similar to that in the form settled in *Scott* v. *Morley* (2), and confined in its application to her separate estate at the time of execution.

MATHEW, J. I agree with my Lord. I see no reason for holding that proof of the existence of separate estate at the date of judgment is necessary in the case of proceedings taken to recover a debt contracted before coverture, though such evidence may perhaps be necessary as regards a debt contracted during cover-

(1) 13 Q. B. D. 691.
(2) 20 Q. B. D. 120.
(3) 12 Ch. D. 484, at p. 491.
(4) 17 Ch. D. 454.

ture. The form of the order may be adapted from that in *Scott* v. *Morley*. (1)

Appeal allowed.

Solicitors for plaintiff: *Clement Cheese & Green.*
Solicitor for the female defendant: *F. T. Rushton.*

H. D. W.

ROBSON *v.* THE OWNER OF THE "KATE."

May 29.

County Court—Admiralty Jurisdiction—"Damage by Collision"—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4.

Damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river is not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and a county court has not Admiralty jurisdiction in respect of such damage.

APPLICATION under the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 43, for a rule calling upon the judge of the City of London Court to shew cause why he should not entertain a cause of "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71). (2)

The affidavit stated that the claim was in respect of the main-sail gear of the sailing-barge *Kate*, of which the defendant was owner, having, while the barge was sailing in the Blackwall reach of the Thames, fouled and injured a pile-driving machine, the property of the plaintiff, which was being used at a wharf on the

(1) Ante, p. 11, note (1).

(2) By the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction to try and determine . . . as to any claim for damage to cargo or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds."

By the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 4: "The third section of the County Courts Admiralty Jurisdiction Act, 1868, shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

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bank, and that the judge had held that the alleged damage was not "damage by collision" within the meaning of the Act, and that he, therefore, had not jurisdiction.

Edward Pollock, in support of the application. The case falls within the Admiralty jurisdiction of the county courts. The facts alleged shew damage the result of "collision." The violent contact of a vessel in the water with a pier or other object on shore constitutes "collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868. The County Courts Admiralty Jurisdiction Amendment Act, 1869, extends the jurisdiction under the sub-section to "all claims for damage *to* ships whether by collision or otherwise." It may be inferred that s. 3, sub-s. 3, of the earlier Act was regarded by the legislature as already extending to damage done *by* ships in the nature of damage by collision. It is the practice in the county courts having Admiralty jurisdiction to entertain suits for collision between barges propelled by oars as coming within the terms of these Acts, though probably suits for collision between barges were not within the original jurisdiction of the Court of Admiralty.

[He cited *The Malvina*. (1)]

WILLS, J. I am of opinion that this rule should be refused. The extended jurisdiction conferred on certain county courts by the County Courts Admiralty Jurisdiction Act, 1868, is essentially an Admiralty jurisdiction, limited as regards amount. It is not necessary to define the word "collision." The words "damage by collision," used as here in an Act the object of which is to confer an "*Admiralty*" jurisdiction, cannot be construed as including damage which has taken place on land, outside the ebb and flow of the tide, and which would certainly not have fallen within the original jurisdiction of the Court of Admiralty in respect to collision. The statute does not, as it appears to me, either in terms or by inference extend the jurisdiction of a county court to the damage of which the applicant complains. The rule must, therefore, be refused.

(1) 31 L. J. (Adm.) 113.

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GRANTHAM, J. I am of the same opinion. In *Everard* v. *Kendall* (1), which was a proceeding by way of prohibition under this Act, Montague Smith, J., is reported to have said: "What is the meaning of 'damage by collision?' We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sustained by a ship from another ship coming in contact with it." This explanation seems to me well founded, and I think the preceding words "damage to cargo," which obviously refer to damage to cargo while on board a ship, tend to shew that the intention of the legislature was to confine the newly-conferred jurisdiction to cases of collision between ships.

Rule refused.

Solicitor for plaintiff: *Keene, Marsland, & Bryden.*

H. D. W.

GRAY *v.* HOPPER.

May 14.

County Court—Power to remit Cause to County Court—Claim reduced below 50*l. by payment under Rules of Supreme Court,* 1883, *Order* XIV., *r.* 4—*County Courts Act,* 1856 (19 *&* 20 *Vict. c.* 108), *s.* 26—*County Courts Act,* 1867 (30 *&* 31 *Vict. c.* 142), *s.* 7.

Payment by the defendant of part of the plaintiff's claim pursuant to a judgment under Order XIV., r. 4, is a reduction of such claim within s. 26 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), and when the claim is reduced by such payment to a sum not exceeding 50*l.*, the action may be remitted to a county court for trial.

Foster v. *Usherwood* (3 Ex. D. 1) considered.

APPEAL against an order made by Denman, J., at chambers, affirming an order of the district registrar in Newcastle-on-Tyne, by which the cause was remitted to the county court for trial. The claim indorsed on the writ was for 66*l.* money had and received by the defendant to the use of an insurance company, of which the plaintiff was secretary. Judgment was entered for the plaintiff for 28*l.*, under Order XIV., r. 4, and the defendant

(1) Law Rep. 5 C. P. 428.

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paid the plaintiff this sum. The registrar afterwards on the application of the plaintiff made the order appealed against.

H. Tindal Atkinson, for the defendant. The registrar had no jurisdiction under s. 26 of the County Courts Act, 1856 (1), to order the cause to be tried in a county court. Sect. 26 gives power to make the order only in cases in which the claim "is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*" Payment of a judgment debt is not "payment into court," or "payment" within the meaning of the section. The words "payment, admitted set-off, or otherwise," are repeated in s. 7 of the County Courts Act, 1867 (2), and "payment" has been held by the Court of Appeal to apply in that section only to payment before the issue of the writ: *Foster* v. *Usherwood* (3), affirming *Osborne* v. *Homburg*. (4) Similarly "admitted set-off" in s. 24 of the County Courts Act, 1856, has been held to apply only to a set-off admitted before the issue of the writ: *Walesby* v. *Goulston*. (5)

Newson, for the plaintiff, was not heard.

(1) By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 26: "Where in any action of contract brought in a superior Court, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a judge of a superior Court on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name."

(2) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 7: "Where in any action of contract brought or commenced in any of Her Majesty's superior courts of common law, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in the county court or one of the county courts in which the action might have been commenced; and, on the hearing of such summons, the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly."

(3) 3 Ex. D. 1.

(4) 1 Ex. D. 48.

(5) Law Rep. 1 C. P. 567.

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LORD COLERIDGE, C.J. I think it plain that there was jurisdiction to remit this action to the county court for trial under s. 26 of the County Courts Act, 1856. The claim had been reduced to less than 50*l.* by a payment which is clearly within the words of the section, "payment into Court, payment, or otherwise." *Foster* v. *Usherwood* (1), which has been cited, is a decision of the Court of Appeal on s. 7 of the later Act, the County Courts Act, 1867. This decision has no bearing on s. 26 of the earlier Act, which is differently worded, and has a different object.

MATHEW, J., concurred.

Appeal dismissed.

Solicitor for the plaintiff: *R. Greening.*
Solicitors for the defendant: *Pyke & Parrott.*

H. D. W.

IN RE BOND.

April 24, 25.

Bankruptcy—Joint Petition by Persons not Joint Traders—Separate Adjudications and Receiving Orders—Jurisdiction to rescind—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 8, 104.

Where debtors who are neither partners nor joint traders join in presenting a bankruptcy petition, the petition is an abuse of the process of the Court, and the Court has jurisdiction, notwithstanding s. 8 of the Bankruptcy Act, 1883, to refuse to make a joint receiving order.

SPECIAL CASE stated for the opinion of the High Court by the judge of the county court at Birmingham pursuant to s. 97, sub-s. 3, of the Bankruptcy Act, 1883.

On February 11, 1888, a receiving order was made against John Bond and Claire Phillippine Bond, jointly, on their own joint petition; and the receiving order was duly advertised in the *London Gazette* on February 14, 1888.

The official receiver after having examined the debtors ascertained that they were husband and wife, and had not traded jointly or in partnership. This fact was brought to the notice of the registrar of the county court, and on February 23, 1888,

(1) 3 Ex. D. 1.

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he ordered the description in the petition to be amended to that effect, and set aside the joint receiving order made on February 11, 1888, and proceeded to make separate receiving orders and orders of adjudication against each of the debtors individually.

The advertisements of the amended receiving orders and adjudications were forwarded in due course to the Board of Trade for insertion in the *London Gazette*, but objection was taken by the Board to the insertion of two receiving orders against two persons not being in partnership and petitioning the Court under one petition.

A statement of affairs had been filed by each of the debtors, from which it appeared that there were no joint assets or liabilities, and that the debtor John Bond had no assets at all, and that the stamp on the petition and deposit were paid out of the effects of C. P. Bond.

On March 15, 1888, the official receiver applied to the Court for directions under rule 334, and contended that the receiving order and adjudication against the debtor John Bond should be rescinded inasmuch as he had obtained the protection of the Court through misrepresentation, and that the result of the adjudication would be that the expenses connected with his bankruptcy would fall entirely on the estate of his wife C. P. Bond. The debtors were served with notice, but did not appear.

The judge, having regard to the imperative terms of s. 8 of the Bankruptcy Act, 1883, doubted whether the Court had any power to make any such order, and referred the case to the High Court.

The questions for the opinion of the Court were—

(1.) Whether under the above circumstances the official receiver, either as official receiver or as trustee, had any locus standi to apply to have an adjudication or a receiving order rescinded.

(2.) Whether the Court had any power to rescind a receiving order and adjudication and dismiss the petition against an admittedly insolvent debtor, and, if so, whether in the present case the receiving order and adjudication ought to be rescinded and the petition dismissed, or what other order ought to be made.

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Muir Mackenzie, for the official receiver, submitted the question, and referred to ss. 8 and 104 of the Act.

The debtors did not appear.

CAVE, J. This is a case stated by the judge of the County Court of Birmingham, pursuant to s. 97, at the request of the official receiver.

The facts are simple. [The learned judge stated the facts as above detailed and continued :—] The questions which presented themselves to the learned judge as questions of importance are two : first, whether the official receiver, either as official receiver or as trustee, had any locus standi to apply to have the adjudication or receiving order rescinded under the circumstances that have been mentioned. I am of opinion that under the circumstances stated the official receiver, whether as official receiver or as trustee, in either capacity, had a locus standi to apply to the Court. As an official receiver, and an officer therefore of the Board of Trade, representing the Board of Trade, and having a duty to make known to the Court all matters which come to his knowledge relating to the bankruptcy, I think it was his duty to bring before the Court the fact that separate receiving orders had been obtained wrongly on a joint petition, and that in that way the revenue had been deprived of a fee of 5*l.*, which would have had to be paid, if, as ought to have been done, there had been separate petitions instead of a joint petition. I am also of opinion that the official receiver had a locus standi as trustee, because, as trustee, he represents the interests of the creditors in the estate of the wife, and as representing their interests it is his duty to see that the assets of that estate are not applied wrongly in paying the expenses of the bankruptcy of the husband. Inasmuch as there was a joint petition, there was danger that the assets might be applied in payment of the expenses of the husband's bankruptcy, and, under those circumstances, in my judgment, the trustee was not bound to wait until any order of that kind had actually been made, but it was his duty to apply at once to the Court in order that proper steps might be taken at the outset to prevent those expenses being incurred at all.

Now, the second point upon which the learned judge desires

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my opinion is, whether there is power to rescind a receiving order, having regard to the language of s. 8 of the Bankruptcy Act. That section is in these terms: "A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order." Now, having regard to that section, it is, undoubtedly, the imperative duty of the Court to make a receiving order where the petition is a proper petition; but, where the petition is, as it is in this case, an abuse of the process of the Court, by joining two debtors who ought not to be joined, thereby depriving the revenue of a fee which ought to be paid, and has for its object the payment of the expenses of a debtor with no assets out of the assets of another debtor—under those circumstances, I am clearly of opinion that the Court has power to refuse to make the receiving order, and, when it appears that the receiving order has been wrongfully made, to rescind it. In point of fact, the registrar here did rescind the joint receiving order, and made a separate receiving order against each of the debtors. I think what he ought to have done was this. He should have rescinded the joint receiving order and made a separate receiving order against the wife, and a separate adjudication against her, and, with regard to John Bond, he ought to have directed the petition to be amended by striking out John Bond's name and all reference to him as an insolvent debtor, thus turning the petition into what it really was, a petition on behalf of the wife alone, out of whose pocket the whole of the costs of the petition up to that time had been paid. By that means there would have been a perfectly good receiving order and adjudication against the wife, and the husband would have been left to take such steps as he might have been advised to take—to file his own separate petition, if he thought fit to, but to do it out of his own assets, and not out of the assets of his wife.

I therefore answer the questions put to the Court in the affirmative, namely, that the official receiver had a locus standi, and that the Court had power to rescind the receiving order and adjudication against John Bond, and that it was the duty of the

Court to do so, and to amend the petition in the way I have pointed out. 1888

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Order accordingly.

Solicitor: *W. Murton.*

H. L. F.

IN RE MAUGHAM. EX PARTE MAUGHAM. *May* 8.

Bankruptcy—County Court—Jurisdiction of Judge to review Order of Registrar —Substitution of Petitioning Creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 104, 107.

The power given to the Court by s. 104 of the Bankruptcy Act, 1883, "to review, rescind, or vary any order made by it" is only given to the Court by which the order is in fact made. Where, therefore, an order dismissing a bankruptcy petition was made by the registrar of a county court:—

Held, that the county court judge had no jurisdiction to review, rescind, or vary the registrar's order.

A creditor's petition in bankruptcy founded on the execution by the debtor of a deed of assignment for the benefit of creditors was dismissed on the ground that the petitioning creditors had assented to the deed. More than three months after the execution of the deed two non-assenting creditors applied to rescind the order dismissing the petition, and asked that their names might, under s. 107 of the Bankruptcy Act, 1883, be substituted for those of the original petitioning creditors.

Held, that the Court had no jurisdiction under s. 107 to entertain the application, the petition having been dismissed, and more than three months having elapsed since the act of bankruptcy upon which it was founded.

APPEAL from a county court judge sitting in bankruptcy.

On July 7, 1887, the debtor executed a deed of assignment for the benefit of his creditors, containing a trust, after payment of preference debts, to distribute everything as in bankruptcy. This deed was assented to by all but two of the creditors, Messrs. Walker & Hall, who on July 15 issued a writ for the amount of their debt, with full knowledge of the fact that all the other creditors had assented to the deed, upon which writ judgment was obtained, and eventually execution was issued. The debtor was an invalid and unable to transact business for himself, and on September 17, Messrs. Beckett, the largest of the assenting creditors, acting with a view to protect the estate for the general body, filed a petition in bankruptcy against the debtor, alleging the execution of the deed of assignment as the act of bank-

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ruptcy, which petition was on October 11 dismissed by the registrar on the ground that the petitioning creditors had assented to the deed of arrangement. At that time more than three months had elapsed since the execution of the deed of assignment, which was no longer available as an act of bankruptcy.

On October 31 the solicitor for Messrs. Walker & Hall gave notice of their intention to apply for an order rescinding or varying the registrar's order of October 11, and substituting the names of Walker & Hall for Beckett & Co. as petitioning creditors. This application was heard before the county court judge on December 5, 1887, and on January 7, 1888, he gave judgment rescinding the registrar's order, and on January 9 substituted the names of Walker & Hall for the original petitioning creditors, and directed the petition to come on for hearing.

The debtor and the assenting creditors appealed.

By s. 104, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction."

By s. 107: "Where the petitioner does not proceed with due diligence on his petition, the Court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor."

Sir R. E. Webster, A.G., and *Yate Lee*, for the appellants.

Herbert Reed, for the respondents.

The arguments appear sufficiently from the judgments.

CAVE, J. I think that this appeal should be allowed; the judge had no authority at all to make the order which he did, and even if he had the authority he ought not to have exercised it. In the first place, the order dismissing the petition was made by the registrar, and the application to rescind it was made to the judge. In my opinion the order which the learned judge then made was clearly illegal. There is not a vestige of a pretence for saying that a county court judge can be asked to review the order of the registrar any more than for saying that a registrar

can be asked to review the order of a judge. Each of these authorities has his own work, and under s. 104 can review, vary, or rescind his own order; their jurisdiction is distinct, and to hold that the one can vary or rescind the order of the other would be to give an appeal not given by the statute, and which does not exist. The judge himself seems not to have been unaware of this objection, for in his judgment he said that if the registrar had been aware of the true facts of the case he would have referred it to him. But this is a mere assumption, which cannot possibly give the judge jurisdiction.

In the second place, I do not think that the order was warranted by s. 107 or any other section of the Bankruptcy Act. The petition had been dismissed on October 11, and no one could then present a petition founded on the act of bankruptcy constituted by the execution of the deed of assignment, as more than three months had elapsed, and the provisions of s. 6, sub-s. 1 (*c*) of the Bankruptcy Act would apply. The effect of what has been done is really to extend the time for filing the petition beyond the statutory period of three months from the date of the act of bankruptcy, and although if upon such an application fraud were alleged the Court would strain its jurisdiction to the utmost, there is no ground whatever in the present case for prolonging the time for filing a petition.

A. L. SMITH, J. I am entirely of the same opinion. I will only add that I think the proper construction of s. 104, sub-s. 1, is that the same Court that makes the order can review, rescind, or vary it. If the registrar makes the order, he is the Court that makes it, and he alone is the Court which can review or rescind it, and the same power is given to the judge, the Divisional Court, and the Court of Appeal. But no one of these Courts can review, rescind, or vary the order of any other unless a right of appeal is clearly given by the statute.

Appeal allowed.

Solicitors for appellants: *Collyer-Bristow, Withers, Russell, & Hill, for Leak, Till, & Stephenson, Hull.*

Solicitors for respondents: *Steadman & Van Praagh, for Muir Wilson, Sheffield.*

W. J. B.

1888
May 15.

IN RE BURDEN. EX PARTE WOOD.

Bankruptcy—Jurisdiction—Debtor's Petition—Statutable Misdemeanors under Debtors Act, 1869—*Jurisdiction of Court to order Prosecution of Bankrupt—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-ss.* 13, 14, 15—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 149, *sub-s.* 2; *s.* 163, *sub-s.* 1.

Where a bankrupt presents his own petition, a Court exercising jurisdiction in bankruptcy has no power since the coming into operation of the Bankruptcy Act, 1883, to order the trustee to prosecute him for any of the statutable misdemeanors created by s. 11, sub-ss. 13, 14 and 15 of the Debtors Act, 1869.

APPEAL from the county court judge of Canterbury sitting in bankruptcy.

In November, 1886, the bankrupt, a grazier and stock dealer, filed his petition in bankruptcy, upon which he was duly adjudicated a bankrupt. At his public examination he was cross-examined with respect to his dealings with his property, the principal charge against him being that he had within four months before his bankruptcy bought stock on credit and at once disposed of it at a loss and applied the money received for it in payment of the claims of pressing creditors, and not in paying the seller of the stock.

On March 6, 1888, an ex parte application was made to the judge by William Wood, a creditor of the bankrupt, on behalf of himself and other creditors, for an order under s. 16 of the Debtors Act, 1869, directing the trustee to prosecute the bankrupt for offences committed by him within the meaning of s. 11, sub-ss. 13, 14 and 15 of that Act. The learned judge held that he had no jurisdiction to make the order, and dismissed the application, being of opinion that s. 11, sub-ss. 13, 14 and 15 of the Debtors Act, 1869, only made the acts therein specified criminal offences if committed by the debtor within four months next before the presentation of a bankruptcy petition against him, whereas in this case the petition had not been presented against him, but had been presented by the debtor himself, and that the provisions of these sub-sections had not been extended by s. 163 of the Bankruptcy Act, 1883, which referred only to

offences committed after the presentation of a petition by or against the debtor.

The creditor appealed.

By s. 11 of the Debtors Act, 1869 (32 & 33 Vict. c. 62): "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour . . . that is to say;

Sub-s. 13: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same:

Sub-s. 14: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

Sub-s. 15: "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud."

By s. 149, sub-s. 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "Where by any Act or instrument, reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act."

By s. 163, sub-s. 1: "Sections eleven and twelve of the Debtors Act, 1869, relating to the punishment of fraudulent debtors, and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words 'if after the presentation of a bankruptcy petition against him,' the words 'if after the presentation of a bankruptcy petition by or against him.'"

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Morton Smith, for the appellant. A debtor who presents his own petition in bankruptcy is not relieved by s. 163 of the Act of 1883 from the consequences of offences committed by him before the presentation of the petition. The language of s. 149, sub-s. 2, of the Act is very wide, and practically renders s. 163 unnecessary; the effect of it is that the presentation of a petition by the debtor himself under the Act of 1883 is the same thing as the presentation of a liquidation petition under the Act of 1869: *Ex parte Gould, In re Walker.* (1) If the county court judge is right, a bankrupt could always escape punishment for offences under the Debtors Act committed before his bankruptcy by merely filing his own petition.

The respondent did not appear.

CAVE, J. I am of opinion that the county court judge was right in refusing this application. The question is one of some difficulty, but upon consideration I have come to the conclusion that what the debtor has done does not amount to an offence under the Acts of Parliament. By s. 11 of the Debtors Act, 1869, a debtor is to be guilty of a misdemeanor if he commits certain specified acts, and the misdemeanors created by sub-ss. 13, 14 and 15 are in respect of acts committed within four months before the presentation of a bankruptcy petition against him or the commencement of the liquidation. Under the Bankruptcy Act, 1869, which was passed concurrently with this Act, a bankruptcy petition could only be presented by a creditor, and the debtor was obliged to present a liquidation petition if he wanted to take the benefit of the Act. Then came the Act of 1883, in which very extensive alterations were made, and its effect was to sweep away petitions for liquidation, and to make the petition in bankruptcy the starting-point of all proceedings under the Act, so that in lieu of the two modes of commencing proceedings, one form only was provided, a bankruptcy petition presented either by the creditor or by the bankrupt himself. The result is that the words of these three sub-sections no longer expressly apply, for the petition which is now presented by the bankrupt himself in lieu of the old liquidation petition is not within the language of the sub-

(1) 13 Q. B. D. 454, at p. 459.

sections. Reliance, however, is placed on the provisions of s. 149 of the Act of 1883, which has already received an interpretation in the case of *Ex parte Gould, In re Walker* (1), and I adhere to the view which was there expressed, that a reference in a lease to the provisions of the Bankruptcy Act, 1869, must be construed with regard to the corresponding provisions of the Act of 1883, so that a reference in the lease to a petition in liquidation became, by virtue of s. 149 of the Act of 1883, a reference to a bankruptcy petition under that Act. In the present case there is, however, this difficulty, that a man cannot be made a criminal by mere words of reference or implication; he must be so made by direct language, and there must be a clear expression of the will of the legislature, and if matters stood there, this consideration would have caused me to hesitate. And when regard is paid to the language of s. 163, these doubts are converted into certainties.

By the first clause of that section, ss. 11 and 12 of the Debtors Act, 1869, are to have the same effect as if for the words "if after the presentation of a bankruptcy petition against him," there were substituted the words "if after the presentation of a bankruptcy petition by or against him;" and it follows from that provision that the legislature had before them at the time they passed it, ss. 11 and 12 of the Debtors Act; we cannot, therefore, suppose them to have been ignorant of the fact that under those sections offences could be committed before, as well as after, the presentation of a bankruptcy petition. Yet, having the whole of those sections before them, they have restricted the enlarged interpretation of the words "presentation of a bankruptcy petition against him" to offences committed after the presentation of the bankruptcy petition, and therefore, whatever might have been my conclusion had there been no express statutory provision, s. 163 contains an express provision omitting, and apparently designedly, all reference to offences committed before presentation of the bankruptcy petition, and we have the express enactment of the legislature as to the extent to which ss. 11 and 12 of the Debtors Act, 1869, are to be amended. We are not at liberty under the general provisions of s. 149 of the Act of 1883 to alter the view which the legislature has expressed in s. 163 of that

(1) 13 Q. B. D. 454.

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Act, and the fact that they have expressly confined the alteration to acts committed after the presentation of a bankruptcy petition is a clear indication of their intention not to refer to acts committed before it. Whether this was intentional or an oversight I will not conjecture; expressum facit cessare tacitum; and I must hold that where the acts relied upon have been committed by the bankrupt before the presentation of a petition, and the petition is presented by the debtor himself, the case is not provided for by the statute.

A. L. SMITH, J. I am of the same opinion, though I have felt some doubt about it. The Act of Parliament creates certain statutable misdemeanors, and we must see that what the debtor has done comes within the language of the Act. Now it is clear that the debtor does not come within the express terms of s. 11 of the Debtors Act, 1869, for there has been no presentation of a petition against him and no commencement of a liquidation, and if it stood there, no statutable misdemeanor could have been committed. But it is said that the effect of s. 149 of the Act of 1883 is to make the words "commencement of the liquidation" in the Debtors Act, 1869, equivalent to the presentation of a bankruptcy petition by him, and that this has been decided in *Ex parte Gould, In re Walker*. (1) As far as that case goes, no doubt that is so, and I do not in any way dissent from that decision; but it does not go the length contended for. We are in the present case met by s. 163 of the Act of 1883, which expressly deals with the statutable misdemeanors created by the Debtors Act. Now how does it deal with that Act? It expressly takes care to alter it so far as regards persons committing offences after the presentation of a bankruptcy petition, and purposely leaves unamended sub-ss. 13, 14, and 15 of s. 11.

This being so, I think that in the present case the amendment has not had the effect of making the acts committed by the bankrupt punishable as statutable misdemeanors under the Debtors Act.

Appeal dismissed.

Solicitors for appellant: *Hayward & Smith, Rochester.*

(1) 13 Q. B. D. 454.

W. J. B.

In re MARTIN.

1888
April 27.

Bankruptcy—Trustee appointed by Creditors an accounting Party—Objection by Board of Trade—Report to High Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 21.

When creditors acting under s. 21 of the Bankruptcy Act, 1883, have appointed a trustee of the property of the bankrupt, and it appears that the person so appointed is an accounting party to the estate, and that questions will arise between him and the estate which will render it difficult for him to act with impartiality by reason of the conflict between his own interests and his duty to the creditors, these circumstances will, as a general rule, justify the Board of Trade in objecting to the appointment under the powers conferred on them by sub-s. 2 of s. 21.

On December 10, 1887, a creditor's petition was presented against F. Martin, in the County Court of Glamorganshire holden at Cardiff, and a receiving order was made thereon on January 6, 1888.

The act of bankruptcy on which the receiving order was made was the execution by the debtor on October 1, 1887, of a deed whereby he assigned all his property to J. Jenkins upon trust for the benefit of his creditors.

On January 11, the official receiver, who had been by the receiving order constituted receiver of the debtor's estate, applied to Jenkins for an account of his dealings with the debtor's estate as trustee under the deed of arrangement, and for payment of the balance he might have in hand.

In reply, Jenkins furnished an account shewing his receipts and payments under the deed of assignment, and inclosed a cheque for 48*l.* 18*s.* 4*d.*, being the balance admittedly in his hands.

On January 21, the debtor was adjudicated bankrupt, and on January 23, an order was made for the summary administration of his estate under s. 121 of the Bankruptcy Act, 1883.

On February 11, the first meeting of the creditors was held, when Jenkins was duly appointed trustee of the bankrupt's estate with a committee of inspection.

On February 13, the appointment of Jenkins as trustee in the bankruptcy was duly reported to the Board of Trade.

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On February 16, the official receiver applied to Jenkins for the repayment of a sum of 10*l.* 1*s.* 8*d.* debited against the estate in the account of his receipts and payments as trustee under the deed of assignment, for costs and expenses incurred in opposing the bankruptcy petition; but Jenkins did not pay it. Correspondence then passed between him and the official receiver, in which the official receiver applied in effect for further accounts, and Jenkins replied, in effect, that he had furnished accounts of all his transactions with the estate which he was advised he was legally liable to render.

On the same day (Feb. 16) the Board of Trade also wrote to Jenkins, pointing out that having dealt with the bankrupt's estate under the deed of assignment he was an accounting party to the estate, and that his appointment was, in the opinion of the board, open to objection on that ground, and inviting him to withdraw from the office of trustee. In reply Jenkins declined to withdraw from the trusteeship, and thereupon the board objected to his being appointed under the provisions of s. 21 of the Bankruptcy Act, on the ground that his connection with the bankrupt and with his estate was such as to render it difficult for him to act with impartiality in the interests of the creditors generally.

On March 10, the majority in value of the creditors sent a written requisition to the Board of Trade requiring them to notify to the High Court their objection to the appointment of Jenkins as trustee of the bankrupt's property. Pursuant to this requisition, the Board of Trade made a written report to the High Court, embodying the above facts and setting forth the grounds of their objection as follows:—

"In the opinion of the Board of Trade one of the duties of the trustee in this bankruptcy would be to inquire into the whole of the dealings of the said J. Jenkins with the bankrupt's estate, and to enforce the rendering of a full account of all such dealings, and of payment of all moneys due from the said J. Jenkins under such an account.

"The Board of Trade are of opinion, upon the construction of s. 21, sub-s. 2, of the Bankruptcy Act, 1883, that where the person appointed by the creditors to fill the office of trustee of the property of the bankrupt is a person who has dealt with the estate of

the bankrupt with notice of an available act of bankruptcy, and where there is reasonable ground for believing that such person is accountable to the trustee in the bankruptcy in respect of such dealings, the connection of such person with and his relation to the estate of the bankrupt, makes it difficult for him to act with impartiality in the interests of the creditors generally.

"The Board of Trade are satisfied upon the facts of this matter:—

"(a.) That the said J. Jenkins has dealt with the estate of the bankrupt with notice of the act of bankruptcy on which the debtor was adjudged bankrupt.

"(b.) That there is reasonable ground for believing that the said J. Jenkins is accountable to the trustee in the bankruptcy for his said dealings with the estate of the bankrupt, and that the said J. Jenkins has failed to account fully to the trustee of the property of the bankrupt in respect of his said dealings, although properly requested so to do.

"(c.) That there is ground for believing that the said J. Jenkins has in his hands moneys forming part of the property of the said bankrupt, which he has failed to pay to the existing trustee, and that the question whether this is so or not can only be ascertained by an investigation to be instituted by some other independent trustee."

The report and objection of the Board of Trade now came on for hearing.

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the Board of Trade. Under s. 21 of the Act it is the duty of the board, when a person is appointed trustee by the creditors, to consider whether he is a proper person, and the Court will not readily interfere with the discretion vested in them by the section unless there is no valid ground for their objection. But in the case of *Re Games* (1), decided in chambers, it was said by the Court, "that there must be a dereliction of duty—the person appointed must be unfit—before the Board of Trade can interfere." It is difficult to under-

(1) 1 Morrell, 216.

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stand that dictum having regard to the language of s. 21, and it is submitted that the Court should, if necessary, reconsider the words and not hold it the duty of the Board to prove a person unfit. To do so might involve great expense and a lengthened inquiry. No doubt, if there is a legal question to be decided, it was not intended by the statute that the board should act in a judicial capacity and decide it. Their duty is to object, and then the matter must be decided by the Court. Under the Scotch Bankruptcy Acts it is a statutable disability to the appointment of a trustee if he has intromitted with the estate and is an accounting party: *McFarlane* v. *Grieve.* (1) The same principle should be applied here.

H. Reed, for the creditors and Jenkins. Unless the person appointed trustee is manifestly "unfit," it cannot be supposed that he will not account, if anything is due from him in any respect either as a trustee under a creditor's deed or in any other capacity; and under s. 102 of the Act the Board of Trade have ample power to compel a full account and to inspect all books and documents. Here there is no reflection whatever on the personal character of the person appointed trustee, and it would be extraordinary if, when the bulk of the creditors desire to appoint him as the person most conversant with the estate and most likely to realize it to the best advantage for them, the Board of Trade were entitled to veto the appointment. It comes to this, that no person who has received anything under a creditors' deed is a fit person to be the trustee in bankruptcy.

Sir E. Clarke, S.G., in reply.

CAVE, J. This is a question which arises under s. 21 of the Bankruptcy Act, 1883, which enables the Board of Trade to make objection to the appointment of trustees, and enacts that if requested by a majority in value of the creditors, they are to notify the objection to the High Court, and that thereupon the High Court may decide upon its validity. Now, I take it that the section, in the first instance, requires the High Court to enter into an investigation, not only of the objection

(1) Murray & Young's Sc. Cas. vol. 10, p. 551.

itself, but of the grounds on which it rests, and that if it is not one which is authorized to be taken by the Act the High Court must disallow the objection. Also, that if the objection is one which is authorized to be taken by the Act, but is one which is not founded upon any valid ground, or upon any facts that can reasonably be held to support it, there also the High Court must hold the objection invalid, and give judgment accordingly.

This being the jurisdiction, in my judgment, vested in the High Court, the question is how the Court ought to exercise it in this case. The 2nd clause of s. 21 requires that the Board of Trade shall certify that the appointment of the trustee has been duly made unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally.

The objection which is taken here is the third of those objections, namely, that the connection of this trustee with, or his relation to, the bankrupt or his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. It is not easy to lay down any general rule, and indeed it is a question of fact with regard to which it is, to my mind, impossible to lay down any accurate general rule. Every case must depend more or less upon its circumstances, and, having regard to the expressions in the Act, one must see whether the facts are such as to lead to the conclusion that the trustee's connection with or relation to the bankrupt or his estate makes it difficult for him to act with impartiality.

Now the connection of the trustee with the bankrupt or his estate which is objected to in this case is that Mr. Jenkins was appointed on October 1, 1887, the assignee of the estate of the debtor under a deed, by which the estate was to be divided amongst the creditors. Undoubtedly that was an act of bankruptcy, and might be treated as such by any dissentient creditor, and therefore it has been laid down that it was the duty of every person to treat it as an act of bankruptcy, and not to act

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upon it in any way or shape until the statutory period had arrived after which it could not be impugned as being such an act of bankruptcy. Unfortunately in this case the trustee did not adopt that course, but in several instances he acted as if no act of bankruptcy had been committed, and consequently by so acting he has raised divers questions between himself and the estate which will have to be decided. The question I have to decide is whether by so doing he has made it difficult for himself to act with impartiality in the matter. It is always difficult, as it seems to me, for a man to decide between his duty and his interests; that is acknowledged upon all hands. No judge, however high or however low, however important or however unimportant the case may be he is called upon to decide, is permitted to act in deciding the matter if he has got any pecuniary interest, however small, in the result of his judgment. What is the case with reference to Mr. Jenkins? Has he made it difficult for him to act with impartiality? To my mind he has clearly done so, because he has put himself in the position in which he will have to decide between his own interests and the claims of the creditors. It is no answer to say that machinery exists by which, if he goes wrong, he may be forced back into the right road. The object of the statute is to avoid any such mischief in the outset, and to enable the Board of Trade to object to the appointment where the circumstances make it difficult for him to act with impartiality. We have a very strong proof, as it seems to me, of this difficulty, because certainly in more than one instance, as far as I am able to judge at present, the contest between the interests and the duty of the trustee has prevented him from acting with impartiality. I have not to decide whether the sums of money that he claims to retain against the estate are rightly retained by him or not, but certainly, upon such an application as this, where he has retained sums of money and has decided those questions in his own favour and against the estate, one would have expected that the most ample explanation would have been forthcoming in order to shew that if it was difficult for him to act with impartiality he had, at all events, surmounted that difficulty in the cases which had already come before him. I cannot, however,

find that he has done so. There is a sum of 10*l.* which he says, at the request of the debtor, he paid to his solicitors as the costs of opposing the petition. This sum appears to have been paid after the act of bankruptcy had been committed, and in order to enable the debtor to oppose the petitioning creditor, the petition being founded upon the execution of that very deed. Undoubtedly it was his duty, being aware of the act of bankruptcy, to refuse to deal with any money in his hands belonging to the bankrupt, until it appeared whether or not the money still continued to remain the money of the bankrupt; because, when that deed was executed there was an act of bankruptcy, and the money might turn out to be the money of the trustee, and not the money of the bankrupt. Whether he acted rightfully or not in this particular instance, as I have said, it is not for me to decide on this particular application. All I can say is, that having to decide between himself and the estate, he has not satisfied me on this occasion that he acted with impartiality. There are also two sums that the trustee had in his hands amounting to 11*l.* 5*s.*, belonging originally to the debtor, received, it is true, before October 1, 1887, the date of the deed, but when dealt with does not at all appear. It does appear that at some time or other Mr. Jenkins applied those two sums in payment of the costs of the investigation which had been made by his firm; he has paid that amount to his firm, and he has altogether omitted to state the important date on which the payments were made. Those payments may or may not be justified, and whether they are justified or not, he has not given me the opportunity of deciding. All I can find is, that in another question arising between himself and the estate he has not enabled me to say that he has exercised strict impartiality, and therefore, besides proof that it was difficult for him to exercise such impartiality, there is very grave reason to suspect that he has absolutely failed to do it. There is another matter which obviously will come on for discussion at some time or other, and, for all I know, there may be others. Although it was his duty, as I have said, to wait until the expiration of the statutory period before dealing with the estate, his title to which might turn out to be invalid, he nevertheless proceeded to deal with that estate, and has incurred costs

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in putting up a portion of the property for sale. Those questions will have to be dealt with at some time or another. His interests will lead him to decide in favour of paying those expenses to himself. His duty to the creditors ought to draw him in the other direction. Consequently there again will be a conflict between his interests and his duty, the very thing which it is contemplated by this section ought not to happen, and the possibility of the happening of which is a good ground for the interference of the Board of Trade. I say nothing about another question which may possibly also arise in time, and that is the temptation he will be under from time to time of shewing by the result that it would have been better for the creditors if the deed of October 1 had been allowed to stand, and that a larger dividend would have been realised under that deed than under the bankruptcy. I say nothing about that, although it is obvious that there again there is some danger and some ground for thinking that unless Mr. Jenkins is a man of somewhat unusual virtue he may be placed in a position of some little difficulty between his own—I will not say his pecuniary—interest, but possibly his reputation as a person skilled in acting as an assignee under a deed of bankruptcy when he is relieved from the inspection of the Board of Trade, and his powers under the Bankruptcy Act where he has to submit and to render an account to the Board of Trade.

I only desire to add a few words with reference to a paragraph that has been quoted from my judgment in the case of *Re Games*. (1) There there was a similar application under a similar part of s. 21, except that in that case the objection was not on the ground of any connection of the trustee with or relation to the bankrupt or his estate, but on the ground that his connection with or relation to a particular creditor (who was the brother of the bankrupt) made it difficult for him to act with impartiality. Now, when that case came to be examined into, there was absolutely nothing to be said against the appointment of the trustee, except that he had been nominated by the brother, who was a very large creditor. There was nothing to shew that he was under any obligation to the brother, that he was in any sense more likely

(1) 1 Morrell, 216.

than anybody else to decide in favour of the brother, or that the fact that he was simply proposed by the brother would in any way render it difficult for him to decide the case as between the conflicting claims of the different creditors. In the report, however, of that case, there is a paragraph which has been referred to, and which is in these terms (1): "It is not said there shall be no opposition to the appointment of a trustee. It is, in fact, intended there shall be opposition, but there must be a dereliction of duty—the person appointed must be unfit—before the Board of Trade can interfere." The learned editor of those reports is so accurate and so careful that I have no doubt I said something of the kind which is to be found there, but I confess at this present moment I can put no sensible interpretation upon those words, and I do not know what they mean. In my judgment the case of *Re Games* (2) should in future be read as if that sentence were not contained in the report. Upon the grounds which I have stated, I think the objection made by the Board of Trade has been fully borne out in this inquiry, and consequently that it must be sustained.

Solicitor for the Board of Trade: *W. Murton.*

Solicitor for the trustee: *O. B. Wooler, agent for Morgan & Scott, Cardiff.*

(1) 1 Morrell, 227.

(2) 1 Morrell, 216.

H. L. F

1888
April 26.

IN RE GALLARD. EX PARTE HARRIS.

Bankruptcy—Sale of Bankrupt's Property subject to Incumbrances—Solicitors Remuneration Act, 1881, *Gen. Ord., Sched. I., rr.* 2, 9—*Bankruptcy Rules*, 1886, *Pt. II., No.* 7, *Gen. Reg., r.* 2.

Where the property of a bankrupt is sold subject to incumbrances, the solicitor of the trustee in bankruptcy is—under r. 9 of Schedule I. of the General Order under the Solicitors Remuneration Act, 1881, and the Bankruptcy Rules, 1886, General Regulations, Part VII., r. 2—entitled to a percentage on the gross amount of the purchase-money and not merely on the amount realised from the equity of redemption.

APPEAL from the decision of the registrar of the Brighton County Court on the taxation of a bill of costs.

It appeared that a bankruptcy petition having been presented against the debtor, the first meeting of creditors was held in August, 1887, and was adjourned to October 6. In the meantime the debtor was by consent adjudicated bankrupt, and the official receiver became the trustee, and contracted to sell a house, part of the bankrupt's property, for 4750*l.*, subject to a mortgage for 3000*l.* The sale was advantageous to the bankrupt's estate. The completion of the sale was fixed for October 6, but was subsequently adjourned until October 18. On October 6 the creditors appointed the appellant trustee of the bankrupt's estate, and on October 14 he received his certificate from the Board of Trade.

On October 18 the trustee completed the sale made by the official receiver. The transaction was carried out by two deeds, a reconveyance by the mortgagee and then a conveyance to the purchaser. The reconveyance was dated the 5th, but was not executed until October 18, when the mortgagee was paid off out of the purchase-money, and the balance, 1750*l.*, was paid to Harris.

Messrs. Griffiths & Eggar, the solicitors of the official receiver, carried in their bill of costs for taxation by the registrar, and claimed commission on the whole of the 4750*l.*, which was objected to by the trustee. The registrar held that as Messrs. Griffiths & Eggar had acted for the official receiver in the matter of the sale,

and had done all the work contemplated by the General Order under the Solicitors' Remuneration Act, 1881, they were, as solicitors of the vendors within the meaning of that order, entitled to the commission claimed. The trustee appealed.

S. Woolf, for the trustee. The rules applicable to this case are rule 2 in Gen. Reg., No. 7 of Part II. of the Bankruptcy Rules, 1886, and sub-rules (*a*) 2 *c* of rule 2 in Schedule 1. to Part I. of the Gen. Order under the Solicitors' Remuneration Act, 1881. The effect of those rules is to give the trustee's solicitor his percentage on the purchase-money only so far as the bankrupt's estate receives it. He is to be paid out of the "proceeds of sale" of the equity of redemption: *In re Grey's Brewery*. (1) Here the equity of redemption realised but 1750*l*. If the contention of the respondents is correct, it will heavily tax the estate, as the bulk of it consists of properties in mortgage.

Muir Mackenzie, for the respondents. This was a sale subject to incumbrances, and part of the transaction was a reconveyance. The case is covered by the 9th rule in Part I. of Schedule I. to the Solicitors' Remuneration Act, 1881. The mortgagee's solicitor is not entitled to a percentage on any part of the purchase-money, and therefore the case does not fall within the proviso in the Bankruptcy Rules.

Sidney Woolf, in reply.

CAVE, J. I think this case was very properly brought before me, as it presents some difficulty in construing the provisions of the Bankruptcy Rules. If the matter came only under the General Order to the Solicitors' Remuneration Act, 1881, it would be tolerably clear. Take the case of a mortgagor selling his property for 5000*l*. free from incumbrances; the solicitor gets his commission on the purchase-money, £5000. Why should not the solicitor get the same commission where the same estate is sold for £500 subject to incumbrances? It cannot make any difference whether the purchase-money goes wholly into the pocket of the owner or whether it is applied in payment of his debts. It is obvious this cannot in any way affect the time and trouble his solicitor will expend on the matter. Accordingly, rule 9 of

(1) 56 L. T. (N.S.) 298.

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Cave, J.

Schedule I. of the General Order to the Solicitors' Remuneration Act, 1881, provides that "where a property is sold subject to incumbrances, the amount of the incumbrance is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption." So that where a property is sold subject to incumbrances the amount of the incumbrance is to be included in the purchase-money in order that the solicitor may get his commission on the total amount. Thus it is clear that the percentage is to be reckoned on the total purchase-money. That being so, turn to the Bankruptcy Rules, 1886, Gen. Reg., Part VIII., r. 2: "in respect of business connected with sales, purchases, leases, mortgages . . . the solicitor's remuneration shall . . . be regulated by the General Order under the Solicitors Remuneration Act, 1881, for the time being in force." If the rule had stopped there, it is clear that the solicitor would be entitled to commission on the gross amount of the purchase-money, including therein the amount of the incumbrances where the property was sold subject to incumbrances; but the rule goes on to say "provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under Schedule I. of the existing order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale." Now, where there is a state of things to which that last portion of the rule is applicable, e.g., where a portion of the purchase-money is chargeable by the mortgagee's solicitor with a percentage, it is clear that the percentage is not to be paid twice over, once to the mortgagee's solicitor and once to the trustee's solicitor, on any part of the purchase-money; but that if the mortgagee's solicitor is entitled to a percentage then, so far, the trustee's solicitor is not to have it. In other words, the estate is not to be charged with a double commission. That is the meaning of the rule. As I am not thorougly conversant with conveyancing business I cannot answer off-hand whether such a case is or is not likely to occur, or whether the rule merely provides for the possible existence of some such case. But in this

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case it is admitted that the mortgagee's solicitor cannot be entitled to any percentage on any portion of the purchase-money because he received notice to be paid off, and has had nothing whatever to do with the sale. That being so, the case does not come within this proviso to the Bankruptcy rule. Reference was made to the concluding sentence of the rule, which provides that the trustee's solicitor's percentage shall be payable only out of the proceeds of the sale; but that clause only specifies the fund out of which the percentage is payable and not the amount on which it is to be calculated. Thus, if the sale of a bankrupt's equity of redemption realises nothing, although the percentage will be calculated on the amount of the incumbrances, yet the trustee's solicitor will get nothing, for there are no "proceeds of sale" out of which it can be paid. I am clearly of opinion that the learned registrar was right, and that this appeal must be dismissed with costs.

Solicitors for appellant: *Ashurst, Morris, & Co.*
Solicitors for respondents: *Griffiths & Co.*

H. L. F.

[IN THE COURT OF APPEAL.]

May 7, 8.

NEWLOVE AND OTHERS *v.* SHREWSBURY.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43)—"*Receipt*"—*Document not constituting Contract—Oral Agreement by which Title given—Chattels—Possession.*

Where, upon an oral agreement by which title to a personal chattel was given by way of security for an advance, the grantor of such chattel signed a "receipt" which was not intended to and did not express the contract between the parties:—

Held, that such document, not being an assurance, was not a bill of sale within the 4th section of the Bills of Sale Act, 1878; and that, the grantee in possession of the chattel under such agreement being able to defend his possession without reference to such document, his title was not affected by the provisions of the Bills of Sale Acts.

APPEAL of the plaintiffs from the judgment of Day, J., on further consideration.

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The action was to recover a lace machine (1) or its value. On the case coming on for trial the learned judge, with the consent of the parties, ordered it to be referred to a special referee for report. His report, so far as material, was to the following effect. The plaintiffs claimed as assignees under a deed of assignment made by a firm of Smith & Hancock for the benefit of their creditors on December 31, 1884. Smith & Hancock had by an agreement in writing dated November 2, 1881, agreed with one Atkinson to manufacture a lace machine for him for the sum of 68*l.*, to be paid by a deposit of 10*l.* down and the remainder in certain specified instalments, the machine to remain the property of Smith & Hancock till the whole amount was paid. The deposit of 10*l.* having been duly paid, the machine was made and delivered to Atkinson, but the balance of the price had never been paid off.

Paragraphs 9 and 10 of the report stated as follows: In March, 1883, Smith & Hancock, being in difficulties, applied to the defendant for assistance. He guaranteed their account at their bankers to the amount of 60*l.*, in consideration of which they made over to him (inter alia) their property in the machine in question and their interest in the agreement for sale of it. It was agreed that, if within the space of four months Smith & Hancock were in credit with their bankers, and the defendant became thereby entitled to revoke his guarantee, the machine and the benefit of the agreement were to revert to Smith & Hancock; but, if the defendant remained liable on his guarantee at the expiration of the time, he was to be at liberty to sell the machine and discharge his guarantee with the proceeds.

The following indorsement was made on the agreement of November 2, 1881: "Received of Mr. William Shrewsbury the sum of 58*l.*, for and in satisfaction of all our interest and property in the lace machine within described and the within written agreement. Smith & Hancock." The document was not regis-

(1) The action was brought in respect of three machines, the facts being different in respect of each, but it has been thought sufficient for the purposes of this report to confine the statement of facts to one of the machines only, inasmuch as, although the facts differed somewhat with regard to each machine, the same point substantially was involved in the case of each.

tered, and the referee found that it did not truly represent the transaction between the parties, the transfer from Smith & Hancock not being absolute but by way of security only. The defendant forthwith caused his name as owner to be painted on the machine which was then in the possession of Atkinson. In July, 1885, the machine was seized under a distress for rent due from Atkinson. The defendant thereupon bought Atkinson's interest therein for 15*l.*, indemnifying him against all liabilities, and having paid out the distress sold the machine for 400*l.* In August, 1885, the defendant paid the bank 300*l.* on his guarantee, and in July, 1886, paid a further sum of 300*l.* on such guarantee, which sums had never been repaid to him. The defendant set up a title to the machine under the agreement made between himself and Smith & Hancock.

The learned judge gave judgment for the defendant upon the report of the referee.

Jelf, Q.C., and *Hextall*, for the plaintiffs, contended (inter alia) that the receipt indorsed on the agreement of November 2, 1881, formed an essential part of the defendant's title to the machine: that it was a bill of sale, and not being registered was void; and that therefore the defendant had no title to the possession of the machine. They cited *Ex parte Parsons* (1); *Ex parte Hubbard* (2); *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3); *Ex parte Stooke.* (4)

Stanger, for the defendant, was not called upon.

LORD ESHER, M.R. We agree with the view of the facts taken by the learned judge below; and upon such view all the difficulties dependent upon the doctrine relating to bills of sale disappear. The question is, whether there was not an oral transaction entirely independent of this receipt, which would entitle the defendant, having the possession of this machine, to retain it as against the plaintiffs. That seems to me to depend on the question whether it can be said that this receipt operated as a reduction into writing of the agreement between the parties with regard to the giving of this security. If the agreement is reduced

(1) 16 Q. B. D. 532.
(2) 17 Q. B. D. 690.
(3) 35 Ch. D. 191.
(4) 20 W. R. 925.

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into writing so that there cannot be any question of a parol agreement independent of the writing, and the writing being a bill of sale is void under the Bills of Sale Acts, then no subsequent possession of the goods can in my opinion give the grantee any right to them; because, the parties having reduced their agreement into writing, such writing is the only evidence of the agreement, and, if that is void, then there is nothing to which the possession can be referred. That was decided in *Ex parte Parsons*. (1) But on the other hand in cases where, there being an agreement with regard to the chattels independently of any writing, a mere receipt has been given which is not an assurance of title at all, then such receipt does not constitute a bill of sale, and the Bills of Sale Acts do not apply. In my opinion the receipt in this case was a mere receipt; it did not operate as an assurance, and was not a bill of sale. The question really is, as it seems to me, was this receipt a reduction of the contract into writing, or was there not in fact an oral contract complete before that receipt was given, which was not reduced into writing thereby, and under which the defendant, having obtained possession, is entitled to possession of the machine as against the plaintiffs? I agree with the view taken of the facts by the learned judge below. The report seems to me in paragraphs 9 and 10 to state that there was such an oral contract, which was complete before the receipt was given, and I do not think that this receipt was given as being the contract between the parties, or in order to reduce the contract or the terms thereof into writing. Putting aside the receipt altogether, we have, I think, an oral agreement to give a security on these goods, which is unaffected by the Bills of Sale Acts, and entitles the defendant, having the possession, to retain it against the plaintiffs.

For these reasons I think the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The question we have to determine turns much more on the general principles of the law of evidence than the provisions of the Bills of Sale Acts. We must consider in the first place what the agreement between the parties was, and whether it was reduced into writing. I do

(1) 16 Q. B. D. 532.

not think the real agreement between the parties ever was reduced into writing or intended to be. The receipt does not appear to me to be intended to express the contract between the parties. The agreement to give the security seems to me to have been by oral agreement antecedent to the receipt, and I think that the defendant upon obtaining possession of the machine is entitled to defend it by proof of such agreement without reference to the receipt at all. The right to possession conferred by such oral agreement cannot I think under these circumstances be upset by reference to the receipt. Where a person in possession of goods can only prove his right to possess them by a document which is a bill of sale within the Bills of Sale Act, 1878, s. 4, and which is not registered, he cannot retain them against the person entitled to them subject to his claim. But, if the right to possess the goods can be proved by parol without reference to any document, the Bills of Sale Acts have no operation. Where there is a document expressing the agreement between the parties, parol evidence of their agreement cannot be given; and the possession must be referred to the document, and, if that is void, possession under it is of no avail. That was decided in *Ex parte Parsons.* (1) But the document here is a mere receipt, and does not express, and was never intended to express the agreement between the parties. The defendant's right to possess does not depend upon the receipt, but upon an agreement not reduced into writing at all. The receipt is not wanted to prove the defendant's title, and its non-registration does not destroy that title. A receipt to be a bill of sale must be a document of title, i.e., a document necessary to the defendant's title, an assurance of some kind, as was decided in *Ex parte Hubbard* (2) and *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3)

BOWEN, L.J. I am of the same opinion. This case does not I think add anything to the general law of bills of sale, but depends rather on the true effect of the statements in the report of the referee. The law on the question, when a receipt is a bill of sale, is laid down in *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) In this particular case the defend-

(1) 16 Q. B. D. 532. (2) 17 Q. B. D. 690. (3) 35 Ch. D. 191.

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ant obtained possession of the machine, and such possession was in accordance with the terms of the agreement stated in paragraphs 9 and 10 of the report. Having so obtained possession, why is his title thereto to be displaced? The suggestion is that, because a receipt was subsequently to the making of such agreement indorsed upon the agreement of November 2, 1881, which receipt did not, as the report finds, express the real transaction, that receipt must be taken to be a bill of sale, and therefore the transaction is void. It seems to me that such a view would work great injustice, and would not be in accordance with the real facts. Two things are, as it seems to me, necessary in order to invalidate the transaction under the Bills of Sale Acts. First, the document in question must be a bill of sale; but it has been held that such a document is not a bill of sale, unless it is an assurance of the goods in law or equity. Secondly, even if the document be an assurance, what the Act strikes at is the document, and, if the transaction be not dependent for its existence on the document, it does not follow that it would necessarily fall to the ground, because the document as a bill of sale would be invalid. It is therefore material to shew that the transaction depends on the document. That would only be so, I think, where the previous agreement was intended to be summed-up and to take effect in the document: then, if the document be void, the transaction must fall to the ground, because evidence of an oral agreement would be inadmissible; but it is otherwise, if the document be not such as to exclude evidence of an oral agreement. Here we find it stated, as it appears to me, in the report of the referee that there was an oral agreement outside the document, and I do not think that the document was intended to be the embodiment in writing of the transaction. For these reasons, I think the decision of Day, J., was correct, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Clinton & Buckley, for Stevenson.*

Solicitors for defendant: *Goldring, Mitchell & Philips, for Brittle.*

E. L.

THE QUEEN *v.* INGHAM.

1888
April 23.

Revenue—Excise—Penalty—Metropolitan Magistrates—Jurisdiction—15 & 16 *Vict. c.* 61, *s.* 1—*Customs and Inland Revenue Act*, 1887 (50 & 51 *Vict. c.* 15), *s.* 4.

By 15 & 16 Vict. c. 61, s. 1, an information "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, and incurred for or by reason of any offence committed against any such Acts or Acts," may be heard and determined, if the offence has been committed within the limits of the chief office of Inland Revenue in London, before a metropolitan police magistrate:—

Held, that the provisions of the section applied to informations for penalties imposed by statute in respect of excise offences created after the passing of the Act, and therefore that a metropolitan police magistrate had jurisdiction to hear and determine an information for the recovery of the penalty imposed by s. 4 of the Customs and Inland Revenue Act, 1887, in respect of the new excise offence created by that section.

ORDER nisi calling on Sir James Ingham, chief magistrate of the Bow Street police court, to shew cause why a writ of mandamus should not issue to compel him to hear and determine the matter of an information exhibited by order of the Commissioners of Inland Revenue against Butler Adams for recovery of an excise penalty, under the Customs and Inland Revenue Act, 1887 (50 & 51 Vict. c. 15), s. 4. (1)

Upon the matter coming before Sir James Ingham, the learned magistrate was of opinion that he had no jurisdiction to hear and determine it; and this order nisi was accordingly obtained by the Commissioners.

F. Mead, for the magistrate, shewed cause. Upon the true effect of the legislation in this respect it is clear that the legislature did not intend that the penalty provided by s. 4 of the

(1) "If any manufacturer of tobacco shall have in his custody or possession any tobacco (except tobacco which must undergo some process of treatment or manufacture before it is fit for sale), or if any dealer in or retailer of tobacco shall have in his custody or possession any tobacco, and such tobacco shall in either case, on being dried at a temperature of 212 degrees as denoted by Fahrenheit's thermometer, be decreased in weight by more than 35 per centum, he shall incur an excise penalty of 50*l.*, and the tobacco shall be forfeited."

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Customs and Inland Revenue Act, 1887, should be recovered before a metropolitan police magistrate. 7 & 8 Geo. 4, c. 53, authorizes the appointment of Commissioners of Excise with jurisdiction throughout the United Kingdom, and by s. 2 provides that any four or more of the Commissioners shall constitute a board of Commissioners of Excise for the United Kingdom, for the collection (inter alia) of all penalties and forfeitures arising, or which shall have arisen, or shall arise or accrue, &c., under any law or laws relating to the said revenues; and by s. 3, "this Act, and the several provisions thereof respectively, shall be deemed and taken to apply to all Acts of Parliament relating to the revenue of excise which shall hereafter be made." Sect. 57 provides that all penalties "imposed by this Act, or any other Act or Acts relating to the revenue of excise," shall be sued for in the Courts of Exchequer within three years next after the commission of the offence in respect of which the penalty is imposed. Sect. 65 provides that where the offence has been committed within the limits of the chief office of excise in London, an information may be exhibited, and may be heard and determined before any three or more of the Commissioners of Excise, but where the offence shall have been committed in any part of the United Kingdom outside those limits the information shall and may be heard and determined upon by any two or more justices of the peace for the county, &c., wherein the offence shall have been committed. By 15 & 16 Vict. c. 61, s. 1, it is enacted that, "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, and incurred for or by reason of any offence committed against any such Act or Acts . . . where the offence shall have been committed . . . within the limits of the chief office of Inland Revenue in London, an information thereupon may be exhibited, heard, and determined, either before any three or more of the said Commissioners of Inland Revenue, or before any metropolitan police magistrate sitting at any metropolitan police court; and such commissioners and magistrate respectively shall, and they are hereby required, upon any such information having been so exhibited as aforesaid, to proceed to hear and determine the same, &c." It is contended that that enactment applies only to offences committed under statutes in

force when the Act was passed, including of course future offences committed under those statutes. It is to be observed that the language differs from the language used in 7 & 8 Geo. 4, c. 53, which Act, by s. 3, is clearly made to apply to penalties imposed by future statutes. The intention of the later Act was to relieve the metropolitan police magistrates from the duty of hearing informations for penalties in respect of excise offences created by future statutes. If the Court think that the intention was otherwise, it is submitted that the true rule of construction is that the provisions of a statute should be construed according to their plain and natural meaning, even though the intention of the legislature may, in the opinion of the Court, be departed from by so doing: see passages cited in Maxwell's Interpretation of Statutes, 2nd ed., pp. 5, 6. It follows that, the offence created by s. 4 of the Customs and Inland Revenue Act, 1887, being an entirely new one, s. 1 of 15 & 16 Vict. c. 61, does not apply to give a metropolitan police magistrate jurisdiction to hear an information for the recovery of the penalty imposed.

Sir R. E. Webster, A.G., Sir E. Clarke, S.G., and *Danckwerts,* for the Commissioners of Inland Revenue, were not heard.

FIELD, J. This is an application for a mandamus to compel Sir James Ingham to hear and determine the matter of an information for a penalty in respect of an offence under s. 4 of the Customs and Inland Revenue Act, 1887. Now it is clear that that section creates a new excise offence, and imposes a new excise penalty of 50*l.* in respect thereof; but provides no remedy for the recovery of the penalty. The remedy is to be found in 15 & 16 Vict. c. 61. That statute recites that by 7 & 8 Geo. 4, c. 53, and other Acts in that behalf, informations for the recovery of penalties imposed in respect of excise offences might be heard and determined by any three or more of the Commissioners of Inland Revenue where the offence was committed within the limits of the chief office of Inland Revenue in London, and where the offence was committed outside those limits by two or more justices of the peace; and s. 1 enacts that "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, and incurred for or by reason of any offence against

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any such Act or Acts," informations for penalties or forfeitures shall, when the offence has been committed within the limits of the chief office of Inland Revenue in London, be heard and determined either before any three or more of the Commissioners, or before any metropolitan police magistrate. The jurisdiction, therefore, is given to the magistrate in respect of penalties "imposed by" any Act or Acts, and "incurred for or by reason of" any offence against such Act or Acts. It is impossible to suppose that this jurisdiction was conferred in respect only of offences already committed at the time the Act was passed. It was contended that the jurisdiction was given in respect of future offences committed under the Excise Acts in existence at the time 15 & 16 Vict. c. 61, was passed. Of course if there had been clear words to that effect—for instance, if the expression had been "for any penalty heretofore imposed by any Act or Acts,"—we should be bound to give effect to those words. But the expression "imposed by any Act or Acts" is ambiguous, and we must decide the question of construction on what we think was the true intention of the legislature. To my mind it is clear that s. 1 was meant to apply to the recovery of any penalties imposed by future Acts of Parliament. It was pointed out by Mr. Mead that in 7 & 8 Geo. 4, c. 53, the legislature had used very careful language to make the provisions of that Act apply to "all Acts of Parliament relating to the revenue of excise which shall hereafter be made"; and he argued from the omission of similar language in the later amending Act that it was not intended to apply to the recovery of penalties imposed by all future Acts. That argument is entitled to consideration, but I think it only comes to this—that the legislature in the Act of Geo. 4 has expressed its intention in language which is perfectly clear, and that in the later Act the language used is not so clear but is still large enough to include penalties imposed by future Acts in respect of offences created by those Acts. I cannot come to the conclusion that, because the 15 & 16 Vict. c. 61, contains no such expression as that its provisions shall apply to all Acts of Parliament relating to the revenue of excise which shall thereafter be made, therefore s. 1 is meant to apply only to penalties for offences created by statutes in existence when the Act was passed.

WILLS, J. I am of the same opinion. The argument on behalf of the magistrate rests on the narrowest possible construction of the word "imposed." It rests upon the use of the past participle; but when you find in the next few lines two past participles used, "incurred" and "committed," which manifestly apply to the future, that argument falls to the ground. It is obvious that the words "incurred" and "committed" apply to future offences, because otherwise the Act would apply only to offences committed at the date the Act came into force. It seems to me impossible to put so narrow a construction upon s. 1; and if "incurred" and "committed" refer to penalties incurred and offences committed after the passing of the Act, there is no principle of construction which should induce us to say that the word "imposed" has not a similar future application to Acts of Parliament. I do not think that the principle of the passages cited from Maxwell's Statutes applies to this case. The question here is one of mere procedure, and has regard only to the application of existing statutory provisions to proceedings for the recovery of excise penalties. I am of opinion that the application for a mandamus should be granted.

Order absolute.

Solicitors for the Magistrate: *Rivington & Son.*
Solicitor for the Commissioners: *The Solicitor of Inland Revenue.*

W. A.

1888
April 28.

[IN THE COURT OF APPEAL.]

COLQUHOUN, APPELLANT; BROOKS, RESPONDENT.

Revenue—Income Tax—Person resident in England—Trade carried on elsewhere than in England—Profits arising or accruing—Profits not remitted to England—5 & 6 Vict. c. 35, ss. 100, 106, 108—16 & 17 Vict. c. 34, s. 2, sched. D.

The respondent, who resided wholly in England, was a partner in a firm carrying on business solely in Melbourne, Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England and returned by him for assessment to the income tax under schedule D. The larger portion of his share of the profits of the firm was not remitted to him in England, but was left in Australia. The appellant contended that the respondent was liable in respect of the whole of his share of the profits, whether received by him in England or not, as being profits or gains arising or accruing to him while residing in the United Kingdom from a trade carried on elsewhere, within the meaning of 16 & 17 Vict. c. 34, s. 2, sched. D:—

Held (by Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), that the respondent was not liable to income tax in respect of that portion of his profits which did not reach him in England.

APPEAL from a judgment of the Queen's Bench Division (reported 19 Q. B. D. 400) on a case stated by Commissioners of Income Tax, which is fully set out in the report below, and from which the following facts appeared:—

The respondent (1) resided in England, but he was a partner in a firm which carried on business solely in Melbourne, Australia.

From time to time sums of money were remitted to the respondent in England in respect of his share of the profits of the business, and on the sums so remitted the respondent was assessed to the income tax. A large amount of the profits was not remitted to the respondent but remained in Australia. The surveyor of taxes contended that the respondent should be assessed and pay duty on this latter amount as well as on that received by him in England. The Commissioners of Taxes were of a contrary opinion, and reduced the assessment accordingly. On appeal to the Divisional Court, Stephen and Wills, JJ., dif-

(1) The terms "appellant" and "respondent" are used with regard to the position of the parties in the Court below.

fered in opinion, and judgment was given in accordance with the opinion of Stephen, J., for the appellant, reversing the decision of the commissioners. (1)

The respondent appealed.

The question arose under 16 & 17 Vict. c. 34, s. 2, sched. D, by which duties are imposed "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere . . . .

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom . . . ."

March 20. *Sir Henry James, Q.C.*, and *Scrutton*, (*Nicoll*, with them), for the respondent. It is contended that a partner in a business carried on in a foreign country, and a colony stands for this purpose in the same position as a foreign country, is not subject to income tax in respect of the profits of such business unless they are received by him in England, although he may reside here. The contention for the Crown must go the length of saying that if a Russian subject, carrying on business in Odessa, happens for any reason to reside in England for six months he may be taxed on the profits of his business in Odessa, though he does not receive any profits here, for temporary residents are by s. 39 of 5 & 6 Vict. c. 35, chargeable after six months' residence in this country. If a person receives profits in this country from a foreign business, he may fairly be subject to income tax in respect thereof as income, for he derives benefit from the protection of the English law in respect of such property, but, in respect of profits arising from a business carried on abroad

(1) 19 Q. B. D. 400.

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which are not received here, there is no such reason why he should be chargeable. There is no machinery for carrying out such an assessment as this. By 16 & 17 Vict. c. 34, s. 5, the duties are to be assessed under the regulations and provisions of the earlier Act, 5 & 6 Vict. c. 35. By s. 100 of that Act, sched. D, r. 3, of the rules applicable to both cases 1 and 2, in estimating the duty on trades carried on by two or more persons all the partners are to be charged jointly; there is no power to tax them separately. Therefore it is not competent to tax one of the partners in respect of this business carried on in Australia. By cases 4 and 5 of the same schedule interest on securities in Ireland or any other of Her Majesty's dominions out of Great Britain and foreign securities, except certain securities under schedule C, is only chargeable when it is received in Great Britain. So, if this had been a case of interest on bonds of a corporation in Melbourne, the respondent would not have been chargeable, because it was not received in this country. Sect. 106 of the same Act provides that a person engaged in trade or business shall be charged by the commissioners acting for the parish or place where the business is carried on; and s. 108, which deals with duties on profits of foreign or colonial possessions or securities, provides that the duty shall be assessed by the commissioners acting for such of certain named places at or nearest to which such property shall have been first imported into Great Britain, or at or nearest to which the person who shall have received such remittances, money, or value from them and arising from property not imported as aforesaid shall reside. These provisions seem to imply that profits not received in this country are not chargeable. This assessment is really an assessment on foreign property. The word "received" in s. 39 of this Act seems to imply that the charge is only on profits accruing in this country. The cases of *Cesena Sulphur Co.* v. *Nicholson* (1) and *Calcutta Jute Mills Co.* v. *Nicholson* (1) are distinguishable. They were cases of companies having registered offices and controlled by directors in this country, and, though the working operations were carried on abroad, there was power to carry them on in this country or anywhere. The whole of the

(1) 1 Ex. D. 428.

profits in those cases came into the hands of companies seated in this country. In this case the firm is a foreign firm and the profits in question are made abroad and never come into this country.

[They also cited *Imperial Continental Gas Association* v. *Nicholson* (1); *Sulley* v. *Attorney General* (2); *Attorney General* v. *Alexander*. (3)]

Sir R. E. Webster, A.G., and *Sir E. Clarke, S.G.* (*A. V. Dicey*, with them). The contention of the respondent involves reading words into the statute which are not there. The words of the section do not involve the conclusion that the profits to be chargeable must be received in this country. The rules for the computation of the duty are mere machinery for particular cases and are not to be read as cutting down the words imposing the duties. Sect. 52 of 5 & 6 Vict. c. 35, provides machinery large enough to cover all cases where a party resides in this country and is chargeable. The hardship suggested in the case of a foreigner carrying on business abroad and temporarily resident in this country does not follow from the contention for the Crown. In this case the respondent is domiciled in this country. The whole of the reasoning of Wills, J., in the court below depends on this principle, that foreign property cannot be subject to the tax, but this principle does not, it is contended, apply in the case of a domiciled Englishman. The express provisions that interest on foreign or colonial securities is only chargeable if received in this country is, on the principle expressio unius, alterius exclusio, strong to shew that the profits of a business carried on abroad accruing to a person resident in England are not exempted.

In *Sulley* v. *Attorney General* (2) the question of the distinction between earning and receiving profits did not arise. When once the profit on the business is ascertained it is immaterial whether the respondent orders it to be sent to England or elsewhere, or invests it in England or elsewhere, or leaves it to be invested in the business. The profits have accrued to him, that is, he is benefited by them, and as he is in England, that is where they have

(1) 37 L. T. 717.

(2) 5 H. & N. 711; 29 L. J. (Ex.) 464.

(3) Law Rep. 10 Ex. 20.

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accrued to him, and they are therefore taxable under the express words of the statute.

The *Cesena Sulphur Company* v. *Nicholson* (1) and the *Calcutta Jute Mills Company* v. *Nicholson* (1) are in point.

Scrutton, replied.

Cur. adv. vult.

1888. April 28. LORD ESHER, M.R. This case seems to me to be one of the very highest importance. The respondent is a subject of the Queen, and he is always resident in England, where he carries on business. He is a partner in a business which is carried on in one of the colonies, which, so far as taxation is concerned, must be treated as if it were a foreign country. He does not take any part in the management of that business, the whole of which is carried on outside the United Kingdom. Part of the proceeds of that business were remitted to the respondent here, and in respect of that part he has paid income tax, but it was insisted that he was bound to pay income tax, not only on that part of the profits which he received in England, but also on the rest of the profits of that trade. The Commissioners of Income Tax on the appeal to them were of opinion that the respondent was so bound, but on appeal to the Divisional Court there was a difference of opinion. Stephen, J., was of opinion that the respondent ought to pay on the whole profits, and Wills, J., agreed with the commissioners. According to the practice of the Courts Wills, J., as the junior judge, withdrew his judgment for the purpose of allowing an appeal, and so the judgment stands according to the view of the senior judge. I must take notice of the fact that this withdrawal of the judgment of the junior judge only takes place when there is an appeal, at least, I am not prepared to say that if there were no appeal it would be done, because judges are equal in point of authority.

The matter depends on schedule D. of 16 & 17 Vict. c. 34, s. 2, under which income tax is payable. It is impossible to have words larger than the words used in both limbs of the section. The only condition is that the person charged shall be residing in the United Kingdom. There is no limitation as to the class

(1) 1 Ex. D. 428.

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of person and none as to time. Taking the words in their largest sense they apply to a foreigner as much as to a subject of the Queen, and it is that which to my mind makes the case so important. If the words are read in their largest sense any foreigner residing for a time sufficient to constitute a residence will have to pay income tax in this country for any kind of property wherever situate, and though no part of the profits comes into this country. So in regard to trade, although it is in every sense an absolutely foreign trade and in no sense an English trade, that is to say, no part of the transaction is carried on from, to, or in this country, if these words are read in their fullest sense, from the mere fact of such a foreigner residing here for a sufficient time, all his trade is liable for the benefit and advantage of this country. Take an example to illustrate this. A person carrying on business in the United States visits this country and resides here for some months, and this now is by no means uncommon, if the full meaning is to be given to this enactment the whole of such a person's trade in America, no part being a trade to England and he taking no part in carrying it on while he is here, would be liable to income tax and would be subject to inquiry by persons in England. Possibly, too, there might be a right to insist on affidavits as to all the circumstances of the business or to require the production of books for examination. Such a result seems to me absolutely contrary to the comity of nations, and would subject us to remonstrances from the government of the United States which this country could not answer.

The case might be put of a foreigner, not a trader, as for instance a Hungarian or Russian nobleman residing here for a short time, and called on to pay income tax in respect of all his possessions in his native country, although no part of the proceeds comes to him here.

Now, what is the rule which we apply to an Act which produces such results by reason of the generality of the words used? It is that the English parliament cannot be supposed merely by reason of its having used general words to be intending to do that which is against the comity of nations. It is true that if we come to the conclusion that this has been intentionally done

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we must carry out the law and leave to the government of the country the task of answering objections, but unless that is perfectly clear we ought to limit the words so as to make them reasonable and proper. That is the ground on which I desire to decide the case—so far as I am concerned I would rather decide it on that general ground, which seems to me so important, than go minutely into the inconsistencies which will arise between this clause and every other enactment in the Act if these words receive their full interpretation.

I know that reliance has been placed by Stephen, J., and reliance was placed in argument here, on those sections of the Act which deal specifically with foreign securities, but I agree with Wills, J., that any conclusion from this must be arrived at with caution, and that, after all, the question is, what is the interpretation of the particular statute?

It would, I think, be easy to shew from the statute itself that the words "from any kind of property whatever" must be read with some limitation. The modes of arriving at the value of landed property, such as that the rack-rent value is to be taken, and the provisions as to working this out, are not applicable to foreign lands. We do not know whether, say in Russia, there are such things as rack-rents, and it is not possible to arrive in that way at the required "annual value." Again, the expression would include foreign funds or securities, and if the words are to be taken in their largest sense the special provisions as to these are superfluous.

What the meaning of the phrase which is often used in this Act, "in the United Kingdom or elsewhere" is, I am not now inclined to consider. It may refer to some outlying parts of the Queen's dominions, which are not colonies, and where the Queen may exercise all her sovereign rights, and in respect of which parliament has a right to legislate, but I cannot think they were meant to include all colonies which have governments of their own, and all foreign countries. But as I have said, I abstain from going through these minute matters in the statute, and I put my judgment on the principle I have already stated. I come to the conclusion that the statute was only dealing with that with which it has a right to deal, and not with land or

business carried on in other countries with which we have no right to interfere, and that the words must be limited, and do not apply to an absolutely foreign trade, no part of which is connected with this country.

I agree, therefore, with the judgment of Wills, J., and I think that the judgment of the Divisional Court should be reversed.

FRY, L.J. In this case I have the misfortune to differ from the Master of the Rolls and to think that the decision of the Divisional Court, expressed by Stephen, J., is the correct decision.

The question which we have to determine is this: can a resident in the United Kingdom be charged with income tax in respect of the profits of a business in the colonies or a foreign country, which profits belong to the resident but have not been transmitted to him or received by him in this country? To answer that question we must turn to the Schedule D contained in the Income Tax Act, 16 & 17 Vict. c. 34, and we find there the intention to create a charge on the person in respect of certain annual profits or gains.

In the first place, I would observe that the tax is in respect of "profits or gains arising or accruing." I cannot read those words as meaning "received by." If the enactment were limited to profits and gains "received by" the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result would be that no income tax would be payable upon profits which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that the words "arising or accruing" are general words descriptive of a right to receive profits.

In the next place, I wish to observe that the language of the statute is express; it is from any profession or trade, "whether the same shall be respectively carried on in the United Kingdom or elsewhere." The words by their alternative description include the whole world, and can be introduced, it seems to me, for no purpose except to express the intention of the legislature to

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charge persons resident in this country in respect of profits derived from any trade carried on in any part of the world.

It will be observed that the whole scope of schedule D is this: If the person be within the United Kingdom then he is to be charged in respect of profits arising or accruing in any part of the world, and if profits arise from a business or property within the United Kingdom, then the tax is to be paid, though the person who ultimately pays may reside in any part of the world. The two branches of the schedule are aimed, the one at the person residing to whom the accrual of profit arises, the other at the thing from which the profit arises, and I cannot help coming to the conclusion that profits arising in a foreign country are not merely within the words, but that they are within the emphatically expressed meaning of this section.

It may not be, perhaps, immaterial to observe that the language of this section is ancient in this sense, that with the single exception that persons residing abroad and not British subjects were not charged by Pitt's Act, 39 Geo. 3, c. 13, schedule D has been, I believe, in the same form in all the Income Tax Acts which have been passed, and, with the exception I have referred to, the language is the same in Pitt's Act, in Addington's Act, and has remained the same throughout.

Turning to the 100th section of the earlier statute, that of 1842, which is still in force, we find that the duties granted under schedule D are to be assessed and charged under certain rules, of which the first is important, because it distinctly shews that the charge is a charge not on the profits but on the person. It says that the duties "shall be charged annually on and paid by the persons, bodies politic," and so forth, "receiving or entitled to the same," and then it goes on to provide certain "rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned." I desire to dwell upon those words, because they seem to me to shew that the intention of the rules is not to diminish the generality of the preceding enactment, but only to furnish a guide where the particular rule applies. Where the rules do not apply, effect must be given to the general enactment independently of them. Now the rules proceed in this way. They state six distinct cases which are subordinate divisions of

the charge created by schedule D, and the first of those is the case in question: "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." Now, I merely refer to these rules to point out that the second rule which follows that first case is as emphatic as the language of schedule D itself, shewing the intention to charge the persons with the profits on any concern carried on by them in the United Kingdom or elsewhere. Pausing there, the conclusion to my mind is that the obvious and express language of the legislature creates a charge upon the person resident in this country in respect of any profits wherever they may have been earned.

Against that conclusion various arguments have been presented to us, which I think may be fairly summarised in three propositions. The first is that which has been expressed with so much force in the judgment of the Master of the Rolls. It is said that it is an outrage on the law of nations to suppose that the legislature of this country could have created a charge upon foreigners resident within this country in respect of the profits on their trades carried on in other countries. It appears to me that that is an argument not for the judge, but for the lawgiver, and that the forcible observations of the Master of the Rolls might well be addressed to the House of Lords in his character of a legislator, but are not adapted to this tribunal, which has merely to determine what was the mind of the legislature as expressed in these enactments. It is to be recollected that the legislature of every country asserts the right to impose certain taxes (to what extent I am not now concerned to inquire) upon every person who enters its territory or becomes a resident in it. It cannot, I suppose, be argued that colonists and foreigners are not liable to customs duties, to the excise, to license duties, or to local rates, when they take up their residence within this country. Whether therefore the mind of the legislature is to charge persons who are foreigners and to require them to pay income tax according to a particular standard, seems to me to be no doubt a mere matter as regards its expediency for the consideration of the legislature, but for the Courts, a mere question of enactment. I do not understand that it is argued that a foreigner is not to be charged with

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income tax in respect of profits which he receives in this country from trade carried on abroad; but if it be lawful and competent to the legislature of this country to charge him with such profits, why is it not within their competence to charge him with profits accrued to him while resident in this country which he does not actually receive here?

The principle upon which we ought to proceed in considering an Act of this description is, I think, to be learned from the language of Lord Cairns, in addressing the House of Lords in the case of *Partington* v. *Attorney General*. (1) "As I understand," he said, "the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be; on the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The next argument which is addressed to us is this. It is said, in the language of Lord Westbury in *Attorney General* v. *Campbell* (2), that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property. This view was dwelt upon by Wills, J., in his able judgment in the Court below. I have no desire, if I had the power, to dissent from that proposition, but, in my judgment, it does not apply to, or govern the present case. Income tax is not, like succession or legacy duty, a charge upon a thing, but, as I have already shewn, a charge upon persons in respect of a thing. I know of no principle of law which prohibits the legislature from using foreign property, or anything in the world that they like, as the standard by which the person resident within this country is to be charged. That is all that is sought in the present case.

The third argument which I desire to consider is this. It is said that there are in the statute itself indications that the charge

(1) Law Rep. 4 H. L. 100. (2) Law Rep. 5 H. L. 524.

is to be made only in respect of the foreign moneys received in this country. In support of that our attention was drawn to cases 4, 5, and 6. I have already observed that the cases are only subordinate divisions. The rules with regard to each case apply only to the particular case. The fourth case relates to the computation of duties on securities in the colonies: the rule there undoubtedly is that the duty "shall be computed on a sum not less than a full amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom in the current year without any deduction or abatement." In the same way under case 5 the computation of duties in respect of foreign or colonial possessions must be on sums actually received in the United Kingdom. In these cases, probably for reasons of convenience, the computation is confined to moneys received, but I am unable to find anything which authorizes me to extend the particular language of those cases to a portion of the tax which does not come within them. The rules, as I have already pointed out, do not furnish any general guide for the interpretation of the statute, on the contrary they seem to me to shew that "receipt" is not the same as accruer, and that when "receipts" were to be dealt with unequivocal language was used. I feel therefore all the more bound to give the natural and full significance to the words "arising and accruing," which are applied to the profits with which we have to deal.

For these reasons I feel compelled to hold that the judgment of the Divisional Court was correct.

LOPES, L.J. I agree with the judgment of the Master of the Rolls, and with the judgment of Wills, J. I cannot agree with the judgments of my Brother Fry and Stephen, J.

The question raised in this case is most important. It is whether a resident in the United Kingdom is to be charged with income tax in respect of the profits of a business in the colonies or foreign parts, which profits belong to the resident, but are not transmitted to, or received by him in this country. This depends upon what is the true construction of schedule D. in the 16 & 17 Vict. c. 34.

It is said the intention of the legislature was, if the person was

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within the United Kingdom, to charge him for profits wherever arising, or if the business was within the United Kingdom, to charge the person wherever residing. I think this is a correct construction of schedule D, but subject always to this, that the profits or gain must be received by or come to the person to be charged in the United Kingdom. I understand the words "arising or accruing to any person residing in the United Kingdom" to mean coming to his hands or received by him in the United Kingdom. The second part of schedule D refers to profits or gains actually made in the United Kingdom, which must be chargeable wherever the recipient resided.

It is difficult to believe that the legislature intended to make a resident in this country, may be for a temporary purpose only, chargeable with income tax in respect of profits made in another country, and which are never transmitted or received in this country, and which are expended in the colony or foreign country.

The provision with regard to temporary residence in the United Kingdom for less than six months favours the construction I put on schedule D. Such temporary residents are not to be charged with income tax as persons residing in the United Kingdom in respect of profits or gains received from or out of any possessions in any of Her Majesty's dominions, or any foreign possessions, or from securities in any of Her Majesty's dominions or foreign securities, but are to be chargeable after six months' residence. The chargeability here depends, it is to be observed, on the profits or gains being received in this country.

Again, there is another indication in the statute that the charge is to be made only in respect to foreign moneys received in this country: see case 10 and the rule applicable to that case.

Can it be successfully contended that while the computation of profits on securities and possessions out of the United Kingdom are to be made only on the amount received in this country, that profits made abroad in a trade or business, which are never transmitted to or received in this country, are to be chargeable? and that, too, although the person to be charged is residing here for a temporary purpose, e.g., less than six months, and in

circumstances when he is not chargeable even in respect of profits on securities or possessions received in this country. I am at a loss to understand on what principle such a distinction can be maintained.

It seems to me obvious that the general words in schedule D (having regard to the provisions to which I have just alluded) must receive some limitation. I think the limitation to be inferred from these sections is that the duty is chargeable only on the amounts received in this country from the business carried on abroad by the persons sought to be charged.

The maxim "Expressio unius, exclusio alterius," has been pressed upon us. I agree with what is said in the Court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

I think a rigid observance of the maxim in this case would make other provisions of the statute inconsistent and absurd, and result in injustice. I cannot, therefore, permit it to govern my decision.

The judgment, therefore, in the Court below in my opinion was wrong and must be reversed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Shepheards.*

A. M.

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April 18, 19, 30.

SHARPE *v.* WAKEFIELD AND OTHERS, JUSTICES OF WESTMORELAND.

Inn—Licence—Renewal—Discretion of Justices with regard to Licence by way of Renewal—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 1, 9, 13, 14, 27—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *ss.* 36, 40, 42, 74—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 26—*Beerhouse Act*, 1830 (1 *Wm.* 4, *c.* 64), *s.* 1—*Wine and Beerhouse Act*, 1869 (32 *&* 33 *Vict. c.* 27), *ss.* 4, 5, 7, 8.

The discretion of the justices as to granting or refusing a licence by way of renewal under the Licensing Act, 1828 (9 Geo. 4, c. 61) and the Licensing Acts, 1872 and 1874, is absolute, provided it be exercised judicially, and the situation of the house as regards police supervision and the requirements of the neighbourhood are matters which the justices have a right to consider in deciding whether to grant or refuse a licence by way of renewal under these Acts.

CASE stated for the opinion of the Court by the chairman of the Westmoreland Quarter Sessions.

It appeared that the appellant, Susannah Sharpe, owner of the Low Bridge Inn, Kentmere, Westmoreland, appealed to the Court as a person aggrieved by an order of the licensing justices of the Kendal division refusing to grant to William Ridding a licence by way of renewal for the sale of all intoxicating liquors at such inn. The justices refused to renew the licence on the grounds of "the remoteness of the inn from police supervision and the character and necessities of the neighbourhood." The court of quarter sessions after hearing evidence on these subjects upheld the order of the justices and dismissed the appeal. It was objected that under the Licensing Acts, 1828, 1872, and 1874, neither the justices nor the court of quarter sessions had jurisdiction to refuse a licence by way of renewal on these grounds. The question for the opinion of the Court was whether or not the licensing justices for the Kendal division and the court of quarter sessions had such jurisdiction. (1)

(1) By 9 Geo. 4, c. 61 (the Licensing Act, 1828), s. 1, "There shall be annually holden a special session of the justices of the peace (to be called the general annual licensing meeting) for the purpose of granting licenses to persons keeping or being about to keep inns, alehouses and victualling houses, to sell excisable liquors by retail to be drunk on the premises therein specified . . . and it shall be lawful for the justices . . . assembled at such meeting or at any adjournment thereof . . . to grant licenses for the purposes afore-

Candy, Q.C., (*E. Sanderson*, with him), for the appellant. The application was improperly refused. In adjudicating upon a

said, to such persons as they the said justices shall, in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper."

Sect. 9. "When any question touching the granting, withholding, or transferring any license, or the fitness of the person applying for such license, or of the house intended to be kept by such person, shall arise, such question shall be determined by the majority of justices . . . who shall be present when such question shall arise."

Sect. 13: "Every license which shall be granted under the authority of this Act shall be in force after the granting thereof for one whole year next ensuing and no longer."

Sect. 14: "If any person duly licensed under this Act shall before the expiration of such license die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt, . . . or if any person so licensed, or the heirs, executors, administrators or assigns of any person so licensed shall remove from or yield up the possession of the house specified in such license; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a license to continue to sell excisable liquors by retail to be drunk or consumed in such house; or if any house being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways or for any other public purpose, or shall be, by fire, tempest, or other unforeseen or unavoidable calamity, rendered unfit for the reception of travellers and for the other legal purposes of an inn; it shall be lawful for the justices assembled at a special session . . . to grant to the heirs, executors, or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee of such bankrupt . . . or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators, or assigns shall by sale or otherwise have bonâ fide conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a license to sell excisable liquors by retail, to be drunk or consumed in such house or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down, &c., and who shall open and keep as an inn some other fit and convenient house, a license to sell exciseable liquors by retail to be drunk or consumed therein."

Sect. 27: "Any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act . . . may appeal to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen."

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 36: "There shall be kept in every licensing district by the clerk of the licensing justices of that district a register, to be called the register of licenses, in such form as may be prescribed by such justices, containing

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claim for a licence by way of renewal the justices are not entitled to take into consideration the "remoteness" of the premises

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the particulars of all licenses granted in the district, the premises in respect of which they were granted, the owners of such premises, and the names of the holders for the time being of such licenses. There shall also be entered on the register all forfeitures of licenses, disqualifications of premises, records of convictions, and other matters relating to the licenses on the register." "Any ratepayer . . . any owner of premises to which a license is attached shall . . . upon payment of a fee of one shilling . . . be entitled to inspect . . . any register."

Sect. 40: "Every person intending to apply for a new license, or to apply for the transfer of a license, shall publish notice of such application as follows:

(1.) "In the case of a new license he shall cause notice thereof to be given, and to be affixed and maintained in manner directed by s. 7 of the 'Wine and Beerhouse Act, 1869,' &c."

Sect. 42: "Where a licensed person applies for the renewal of his licence, the following provisions shall have effect:—

"(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend.

"(2.) The justices shall not entertain any objection to the renewal of such license, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such license has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any license to a future day, and require the attendance of the holder of the license on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given.

"(3.) The justices shall not receive any evidence with respect to the renewal of such license which is not given on oath.

"Subject as aforesaid licenses shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

By s. 74: "'A new license' means a license granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors."

"'The renewal of a license' means a license granted at a general annual licensing meeting by way of renewal."

"'Licensed premises' means premises in respect of which a license . . . has been granted and is in force."

"'Owner of licensed premises' means the person for the time being entitled to receive either on his own account, or as mortgagee or other incumbrancer in possession, the rack-rent of such premises."

By the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 26: "Whereas by s. 42 of the principal Act it is enacted that a licensed person applying for the renewal of his license need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted, that such requisition shall not be made save for some special cause personal to the

"from police supervision" or "the character and necessities of the neighbourhood."

licensed person to whom such requisition is sent."

"It shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licenses or applicants for licenses who are not required to attend at such adjourned annual general licensing meeting."

"A notice of an intention to oppose the renewal of a license served under s. 42 of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such license is to be opposed."

By the Beerhouse Act, 1830 (9 Geo. 4 & 1 Wm. 4, c. 64), s. 1: "It shall be lawful for any and every person who shall obtain a license for that purpose under the provisions of this Act to sell beer, ale, and porter by retail in any part of England in any house or premises specified in such license."

By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27):

Sect. 4: "No license or renewal of a license for the sale by retail of beer, cider, or wine . . . . shall be granted except upon the production and in pursuance of the authority of a certificate granted under this Act."

Sect. 5: "Certificates under this Act shall be granted by the justices assembled at the general annual licensing meeting held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting."

Sect. 7: "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, township, or place in which the house or shop in respect of which his application is made is situate and to the superintendent of police of the district, and shall in such notice set forth his name and address and a description of the license or licenses for which he intends to apply, and of the situation of the house or shop in respect of which the application is made; and in the case of a house or shop not theretofore licensed, &c., such person shall also within the space of twenty-eight days before such application is made cause a like notice to be affixed and maintained on the door of such house or shop, and on the principal door or on one of the doors of the church or chapel, &c."

Sect. 8: "All the provisions of the 9 Geo. 4, c. 61, as to the terms upon which and the manner in which and the persons to whom grants or licenses are to be made by the justices at the said general annual meeting and as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a license to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of the following grounds, viz.:—

"(1.) That the applicant has failed to produce satisfactory evidence of good character, &c."

"(2.) That the house or shop in respect of which a license is sought or any adjacent house or shop owned or occupied by the person applying for a license is of a disorderly character,

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It is contended that even on an application for a licence for the first time they are not entitled to consider these matters. The principal enactment, s. 1 of the Licensing Act, 1828 (9 Geo. 4, c. 61), provides that "it shall be lawful for the justices to grant licenses for the purposes aforesaid (*i.e.*, the keeping of inns, alehouses and victualling houses, and the sale of excisable liquors by retail to be drunk on the premises) . . . to such persons as they shall in the exercise of their discretion deem fit and proper." The section appears to limit the discretion of the justices to judging as to the personal fitness of the applicant, and perhaps as to the suitability of the premises for use as an inn. As to renewals, s. 14 provides for the transfer of licences to the personal representatives, assignees in bankruptcy, and vendees of the occupiers of public-houses, and contains the words: "a license to continue to sell." The effect is that an already licensed applicant is primâ facie entitled "to continue to sell," and that the renewal of his licence can only be refused for his own misconduct or because the house is not suitable, and also that the licence attaches under the statute not only to the publican but to the inn.

The subsequent Acts, the Licensing Acts, 1872 and 1874, proceed upon both assumptions. The vested right of the licensed applicant is implied in s. 42 of the Licensing Act of 1872. This section renders it illegal for the justices to entertain any objection to the renewal of the licence unless the applicant has been served with written notice of the grounds of opposition, and unless upon evidence given on oath. Sect. 26 of the Licensing Act, 1874, expressly prevents the justices from requiring the attendance of the applicant "except for some special cause personal" to himself. The grounds of opposition stated in the case, "remoteness from police supervision," and "the character and necessities of the neighbourhood" are not causes "personal" to

or frequented by thieves, prostitutes, or persons of bad character, &c."

Two other grounds follow.

Sect. 19: "Where a license is in force with respect to any house or shop, &c. . . . it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a license for the sale of beer, cider, or wine not to be consumed on the premises may be refused in accordance with this Act."

the licensee, and he could not therefore have been required to attend at the sessions. The Act cannot mean that the licensee may be deprived of his licence without being heard.

That the licence is appurtenant to the premises is shewn by the provisions of the Licensing Act, 1872, for the protection of the interests of the "owner" (as defined in s. 74) of public-house property. By s. 36 a register of licences is to be kept, and "the owner" is entitled to inspect the register. On the register are to be entered "all forfeitures of licenses, disqualifications of premises, and records of convictions." Thus the statute enables the landlord to watch the conduct of the tenant, and, if it is unsatisfactory, to interfere in order to prevent the depreciation of the goodwill. The effect of this legislation is to place an additional restraint on the discretion of the justices in the interest of the owner of licensed premises. They are bound to grant a licence by way of renewal in respect of premises already licensed, irrespective of the grounds stated in the case.

[He cited *Reg.* v. *Justices of Liverpool* (1); *Reg.* v. *Justices of Market Bosworth* (2); *Reg.* v. *Sylvester* (3); *Reg.* v. *Justices of Lancashire.* (4)]

Addison, Q.C. (*Poland,* with him), for the respondents. The appeal should be dismissed. The discretion of the justices is and always has been absolute as regards the granting of public-house licences, whether for the first time or by way of renewal. The Act 9 Geo. 4, c. 61, is to a great extent a re-enactment of previous statutes. The question was decided on the earlier statutes in 1765, in the King's Bench, in *Reg.* v. *Hann and Another.* (5) There the Court made absolute a rule for an information against two justices for a misdemeanor in the execution of their office in refusing to grant a licence to sell ale to an innkeeper in the borough "out of pique and resentment, and upon bad motives, arising from their attachments in respect to a late parliamentary election, and acting therein under the influence of one of the candidates." Lord Mansfield said, "The Court should never interpose against magistrates unless they have acted from bad motives and

(1) 11 Q. B. D. 638.
(2) 56 L. J. M. C. 96; 57 L. T. (N.S.) 56.
(3) 2 B. & S. 322.
(4) Law Rep. 6 Q. B. 97.
(5) 3 Burr. 1716, 1786.

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malâ fide, especially in such a case as this where they are entrusted with an absolute discretion." Nothing in any subsequent statute or decision has in any way altered the law as thus laid down. Sect. 1 of 9 Geo. 4, c. 61, places "persons keeping inns" on the same footing with "persons being about to keep inns" as regards their applications for licences, and licences are to be granted only to such persons as "the justices shall in the exercise of their discretion deem fit and proper." The provisions of the Licensing Acts 1872 and 1874, are mere rules of procedure. Sect. 42 of the Licensing Act, 1872, expressly enacts: "subject as aforesaid licenses shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." The Wines and Beerhouse Act, 1869, an Act which does not relate to public-houses, in applying the provisions of 9 Geo. 4, c. 61, to the licensing of beerhouse keepers and retailers of beer, expressly limits the discretion of the justices to certain specified causes of refusal. This exception shews that, where the legislature has not limited the discretion of the justices, it is still absolute.

Candy, Q.C., in reply.

Cur. adv. vult.

1888. April 30. FIELD, J. The case stated raises the question whether or not the court of quarter sessions of Westmoreland and the licensing justices, whose decision the court of quarter sessions has affirmed, had jurisdiction to refuse to William Ridding a licence by way of renewal for the sale of all intoxicating liquors at the Low Bridge Inn, Kentmere, Westmoreland, on the grounds of the "remoteness" of the inn "from police supervision" and "the character and necessities of the neighbourhood."

This question, in my opinion, depends entirely upon the true construction of the Licensing Act of 1828 (9 Geo. 4, c. 61). It has been argued that certain subsequent statutes and decisions also require to be considered, and that the effect of these subsequent statutes and decisions has been to alter the law; but in my opinion this is not the case, the Licensing Act of 1828 alone applies, and under this Act, on its proper construction, the

justices were entitled, in the exercise of their discretion, to refuse a licence by way of renewal on these grounds.

For the appellant it was contended that owing to the effect of these subsequent statutes and decisions, even had the application been not for a licence by way of renewal, but for a new licence, the magistrates could not have legally refused to grant it on these grounds. This contention, I must say, surprised me. I had long supposed that no proposition of law was better established than that the justices have an absolute discretion, by which I mean an extremely wide discretion, to be exercised, of course, as discretion is in every such case to be exercised, in a judicial manner, as to the granting of new licences. I have now examined these subsequent statutes and decisions, and I am of opinion that they have not in any way altered the law as to the discretion of the justices, whether as to granting a licence for the first time or a licence by way of renewal.

Before referring to the legislation subsequent to the Licensing Act of 1828, I wish to refer to the state of the law at and before that date.

The case of *Rex* v. *Young and Pitts* (1), which came before Lord Mansfield and other judges of the King's Bench in 1758, is of great importance as regards this matter, and, so far as I know, the decision has never been questioned. It was an application for an information against two justices of the peace "for arbitrarily, obstinately, and unreasonably refusing to grant a licence to one Henry Day to keep an inn at Eversley . . . . for which occupation of keeping an inn this man was (as these two justices themselves had allowed on a former occasion) a proper person, they having before licensed him to do so at another place." The application was for the renewal of a licence granted to the publican with respect to some other inn. Lord Mansfield said that the matters "did impute a criminal intention; for though the justices have, it is true, a discretion in these cases, yet it must not be permitted to them to exercise an arbitrary and uncontrolled power over the rights of other people, and in cases where their livelihoods are so essentially concerned." Ultimately on argument it appeared that there was no such evi-

(1) 1 Burr. 556.

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dence of partiality, corruption, or fraud, as to form any ground for an information, and it was held that the justices had properly exercised their discretion, and that the Court could not interfere with them in the exercise of their discretion. This case shews that when the Licensing Act of 1828 passed, the law on the subject had been settled for at least seventy years, and that the discretion of the justices as regards the granting of licences was absolute according to the definition which I have given, whether exercised with respect to a new licence or with respect to a licence granted by way of renewal. The legislature in 1828 must have known that this construction had been put by the Courts on previous Licensing Acts, of which there had been several.

I proceed to consider the provisions of the Licensing Act of 1828 (9 Geo. 4, c. 61). The 1st, which is the most important section, provides for the holding by the magistrates of a "general annual licensing sessions for the purpose of granting licenses to persons keeping or being about to keep" inns. It is to be observed that no distinction is drawn between those who "keep" or those who are "about to keep" inns. The section says "it shall be lawful for the justices to grant licenses to such persons as they shall, in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper." Words could hardly be used which would vest in the justices a wider or more complete discretion. There is nothing in them to confine the justices, in the manner which has been suggested, to the considerations of the personal character of the applicant and that of the suitability of the house for use as an inn. The 9th section specifies the matters which may come before the justices for decision. They are "any question touching the granting, withholding, or transferring, any license, or the fitness of the person applying for such license, or of the house intended to be kept by such person." Clearly, therefore, personal fitness and the fitness of the house are not the only questions for the justices. They may decide "any question touching the granting, withholding, or transferring any license." These words also shew that the intention of the legislature was to vest in the justices a wide and complete discretion under the Licensing Act of 1828. I think it clear, therefore, that the law remained the

same as in 1758 when Lord Mansfield decided *Rex* v. *Young and Pitts*. (1)

Again, this Act, the Licensing Act of 1828, is, subject to a qualification, incorporated with the Wine and Beerhouse Act, 1869, and in the case of an application under that Act in respect of a house not previously licensed, Lush and Hannen, JJ., in *Reg.* v. *Justices of Lancashire* (2), held that the justices may and ought to take into consideration the number of houses in the neighbourhood already licensed, and refuse the certificate if they think an additional beerhouse unnecessary or undesirable in the interests of the public. Lush, J., said: "It is obvious that the words"—those of ss. 1 and 9 to which I have drawn attention—" point not merely to the merits of the applicant, but must be read in a wider sense as referring to the merits of the application; and they authorize and by implication require the justices to govern their discretion in granting or withholding the licence by reference not only to the qualifications of the person and to the suitableness of the house, but to other considerations also. These considerations must include the nature of the locality, the number of the houses already licensed, and all other circumstances bearing on the question whether it is fit and proper in the interest of the public, for whose benefit these Acts are passed, that an additional license shall be granted." These remarks have a direct bearing on the present case. *Reg.* v. *Justices of Lancashire* (2) is a case of an application for a new licence, but under the Licensing Act of 1828 a licence by way of renewal was on the same footing as a licence granted for the first time. A renewed licence was simply a new licence, though it happened to be granted to an already licensed person and in respect of the same premises. The expressions "renewal of a license" and "license granted by way of renewal" first occur in ss. 42 and 74 of the Licensing Act, 1872. Two cases which were cited, *Reg.* v. *Sylvester* (3) and *Reg.* v. *Walsall* (4) shew that, for the very reason that the discretion of the justices under the statute is absolute, the Court will see that their statutory jurisdiction is exercised in a judicial manner and in accordance with

(1) 1 Burr. 556.
(2) Law Rep. 6 Q. B. 97.
(3) 2 B. & S. 322.
(4) 3 C. L. R. 100.

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the law. They must hear and decide each particular case. They must not impose illegal conditions upon applicants for licences.

Such is the effect of the Licensing Act of 1828. It is said that subsequent legislation and decisions have so altered and improved the position at all events of the already licensed applicant that provided he is a fit person and occupies a fit house he can demand a renewal as of right, and that the justices cannot, in the exercise of their discretion, look beyond these two considerations.

The first two subsequent Acts do not affect inns or public-houses. The Beerhouse Act, 1830, merely regulates the granting of "excise licenses" for the sale of beer. Between this date and 1869 the sale of wine by confectioners and keepers of refreshment rooms was authorized by statute. The Wine and Beerhouse Act, 1869, vests in the justices almost the same discretion as the Licensing Act, 1828, with reference to beer and wine to be consumed on or off the premises. By s. 8 "all the provisions of the 9 Geo. 4, c. 61, as to the terms upon which, and the manner in which, and the persons to whom grants of licenses are to be made by the justices at the general annual licensing meeting shall, so far as may be, have effect with regard to grants of certificates under this Act." This is the section on which *Reg.* v. *Justices of Lancashire* (1) was decided. The section continues: "subject to this qualification, that no application for a certificate to sell by retail beer or wine not to be consumed on the premises shall be refused except on one or more of the following grounds: viz. (1) that the applicant has failed to produce satisfactory evidence of good character." Three other grounds follow. By s. 19 an application for a certificate to sell beer on the premises, where a licence is already in force, can only be refused on the same four grounds. These sections shew that the legislature well knew the absolute character of the discretion of the justices under the Licensing Act, 1828, and deliberately qualified the discretion in certain exceptional cases. No argument in favour of the appellant can be based on this legislation.

These Acts affect only beerhouses. The Licensing Acts of 1872 and 1874 apply to inns and public-houses. The appellant

(1) Law Rep. 6 Q. B. 97.

relies on these Acts as shewing an intention on the part of the legislature to confine the discretion of the justices within narrower limits.

By s. 36 of the Act of 1872 a register of public-house licences is to be kept, and "there shall be entered on the register, all forfeitures of licenses, disqualifications of premises, records of convictions, &c.," and this register any owner of a public-house has a right to inspect. A licence, of course, adds to the value of the house, and this section is useful to the landlords of public-houses, because it enables them to watch the conduct of their tenants, and, if necessary, to interfere to prevent the disqualification of the premises. What has this to do with the discretion of the justices? It was said that because the section thus assists the landlord, the legislature must be taken to have qualified and reduced the discretion of the justices in the interest of owners of public-house property. There is no colour for the suggestion.

It was further argued that because s. 42 of the Licensing Act, 1872, and s. 26 of the Licensing Act, 1874, give advantages to the already licensed applicant as regards matters of procedure, that because these sections provide that he need not attend the licensing sessions unless he is required to attend, that he cannot be required to attend except for some reason personal to himself, that he is to receive written notice of any objection to the renewal of his licence, and that evidence given in the matter must be on oath; therefore the legislature must intend that the already licensed applicant shall be entitled to claim a licence by way of renewal as of right if he is a respectable man and the house is suitable. This is a perfectly untenable contention. The effect of the legislation is merely to give a statutory safeguard to the already licensed person. He has given notice, produced certificates, and gone through the ordeal of an examination before the magistrates. Therefore he is regarded as having a primâ face claim to the renewal of his licence. It was contended that this claim could not be defeated except for "some personal reason," whatever this may mean. If this had been the intention of the legislature some statute would have said so. What the Licensing Act of 1872 does say is (s. 42), "the powers and discretion of the justices relative to the renewal shall be exercised as heretofore."

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I may add that the policy of a more recent Act, the Beerdealers' Retail Licences Act, 1882 (45 & 46 Vict. c. 34), is similar. In *Reg.* v. *Kay* (1) my brother Stephen and myself held that according to the plain terms of that Act the discretion of the justices is absolute as regards the renewal of licences for the sale of beer to be consumed off the premises.

As regards decisions, I have cited *Reg.* v. *Justices of Lancashire.* (2) The case of *Reg.* v. *Justices of Market Bosworth* (3), a decision of the Lord Chief Justice and my brother Smith, does not assist the appellant, and has no bearing upon the question. The case of *Reg.* v. *Justices of Liverpool* (4), in the Court of Appeal, which is cited in the judgments, has nothing to do with the discretion of the justices, and it is plain that neither the Lord Chief Justice nor my brother Smith supposed that they were dealing in any way with the question of the discretion of the justices.

There is, therefore, no statute or decision, old or recent, which raises any doubt as to the absolute discretion of the justices in granting a public-house licence either for the first time or by way of renewal. They are perfectly unfettered in the exercise of their discretion, as long as they exercise it judicially. For these reasons I think it was competent to the licensing justices and to the quarter sessions for Westmoreland to withhold this licence for the reasons stated in the case, and that therefore this appeal should be dismissed.

WILLS, J. I desire to express my entire concurrence in the result of my brother Field's judgment; and after the very elaborate review which he has given of the statutes and the cases I feel that it would be a waste of time for me to go minutely over the same ground; but I wish shortly to state in my own way the grounds of my opinion.

I think it cannot be doubted that before the Act of 1872 every application for what is now called the renewal of a licence was exactly the same thing in all its legal incidents as an application for that which is now called a new licence. There was but one enactment under which such application could be dealt

(1) 10 Q. B. D. 213.
(2) Law Rep. 6 Q. B. 97.
(3) 56 L. J. M. C. 96; 57 L. T. (N.S.) 56.
(4) 11 Q. B. D. 638.

with, viz., 9 Geo. 4, c. 61, s. 1. The licence, if granted, lasted for a year and no longer, s. 13. When the year expired it was gone, and if the applicant did not get a fresh licence there was an end of his right to sell excisable liquors to be consumed on the premises. The word "renewal" does not occur in the Act. The expression "to renew a license" appears in the marginal note to s. 27 and nowhere else, and the use of the phrase there comes to no more than if it were used in a text-book. The phrase "new license" is equally absent from the Act of 1828. The phrase "renew" as applied to a licence first appears, so far as I know, in 23 Vict. c. 27, s. 11, the Act of 1860 relating to wine licences, which, so far as I am aware, is not incorporated expressly or impliedly by the subsequent Acts, and which I only notice for the purpose of tracing the use of the phrase in legislation of a kindred nature. In the Act of 1872 both phrases are defined. The definition of "new license" is modified by the Act of 1874, s. 32, but only to correct a mistake which arose from using in the definition the term "licensed premises," which, inasmuch as premises never were licensed, had to be interpreted by another part of the interpretation clause defining "licensed premises" which contained words likely to create confusion if applied to some of the circumstances under which the statutory interpretation of "licensed premises" as it stood in the Act of 1872 might have to be resorted to. I may therefore take the definition given by the Act of 1874, which is "a license granted at a general annual licensing meeting in respect of which a similar license has not been granted before." A "renewal of a license" is defined as "a license granted at a general annual licensing meeting by way of renewal."

As the licence, though only to be exercised in respect of specified premises, is in all cases a personal one, and the phrase "licensed premises" is only introduced in company with a definition clause which shews that it is, taken by itself, an inaccurate and misleading phrase (and one which I cannot help thinking is answerable for a good deal of misapprehension), I think it follows that a licence granted by way of renewal is a phrase applicable only to the case in which both the person applying and the premises are the same as those appearing in the

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previous licence. A document can hardly be said to be by way of renewal of another where so important a factor as the person to whom alone it can apply is changed. The phraseology of s. 42 of the Act of 1872 seems to me completely to bear out this view. It treats the applicant for renewal as necessarily a person already licensed.

So far it is, I think, impossible to contend that there was by the Act of 1828, 9 Geo. 4, c. 61, any limitation upon the absolute discretion of the justices when applied to for a new licence to grant or refuse it upon any grounds which to them seem fit grounds to act upon, provided that there is a real judgment exercised in respect of the individual case. I mean to exclude, for instance, a case in which the ground of refusal had absolutely nothing to do with the question in hand, as for instance, where the justices refused the licence because the applicant had not taken out a spirit licence, *Reg.* v. *Sylvester* (1), or where they had laid down a general rule that they would grant no more licences in the locality: *Reg.* v. *Justices of Walsall.* (2) In such cases there is really no exercise of discretion at all, and it is very much as if the licence had been refused because the applicant wore a blue coat or a white hat. But where it cannot be shewn that no real discretion has been exercised, the applicant has in case of refusal no other resort, and must submit to his fate. I do not pause to cite cases. It is abundantly clear upon the words of the Act, and there is equally abundant authority upon the subject, and as by that Act there was absolutely no distinction between applications for licences made at the annual general licensing sessions by a person who did not, and those made by a person who did already hold a licence, it followed that there was no limit to the discretion of the justices in the case of renewal any more than in the case of a grant for the first time.

I proceed to inquire what the Acts of 1872 and 1874 have done for a person already holding a licence. By s. 42 of the Act of 1872 the applicant for the renewal of a licence is undoubtedly put in a better position than he would have been in, had he no licence. By that section he is relieved from the necessity of appearing personally to obtain the licence, whereas

(1) 2 B. & S. 322.

(2) 3 C. L. R. 100.

it is clear from s. 12 of 9 Geo. 4, c. 61, that the applicant for a new licence must do so unless prevented by one of the causes there mentioned. If objection be taken to the renewal of the licence, he is entitled to notice and to a hearing, but the omission by an objector to give notice at the proper time was not necessarily fatal to the objection, as the magistrates might in their discretion adjourn the case and require the applicant to attend upon a future day to have the case heard, and the evidence on the hearing of the objection must be taken upon oath. Subject to these conditions, however, licences were to be renewed and the discretion of the magistrates exercised as theretofore.

The alteration was simply one of procedure, and made it imperative upon the justices to give the applicant an opportunity of being heard: but there is nothing at all in the Act to limit their discretion as to the class of objections which they will entertain and act upon.

Then came the Act of 1874, which contains further provisions in favour of the applicant for the renewal of a licence. Such applicants are relieved from personal attendance, if they do not wish to give it, unless the nature of the objection be some special cause personal to such licensed person. They are entitled to have notice of the grounds of any objection to their applications. It is further provided that it shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licences or applicants for licences who are not required to attend at such adjourned annual general licensing meeting. I find it very difficult to say what this provision means, and I doubt very much if its meaning with reference to the then existing legislation was understood by any one when it was passed; but it is a provision in ease, not of the persons applying for licences, but of others—I cannot say of whom—for I do not see who was likely to serve notice of adjournment in the case of such applicants for new licences as were not required to attend personally. I am quite sure, however, that an obscure general provision of this kind, relating solely to procedure, was never meant to interfere with the discretion of the justices.

As I understand the argument on this head it is as follows: "Because if objection be taken to an application for renewal

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for the first time at the annual general licensing meeting there must be an adjournment, and because it is only in the case of that objection being one personal to the applicant that he can be required to attend personally, and because it is said that in case of adjournment it shall not be necessary to serve notice of adjournment on the holder of a licence (or the holder of a licence not required to attend at such adjourned meeting, for the section may be read both ways) therefore the application of a holder of a licence cannot be objected to on any ground but one personal to himself." I am not sure what the provision does mean; but I am quite sure it does not mean this—and that the repeal of a most important discretion, absolutely necessary for good government and administration, has not been effected in this roundabout and bungling fashion. There are an abundance of cases upon which it is just as necessary to refuse to renew a licence as to grant a new one where the personal character of the applicant may have nothing whatever to do with the objection. Suppose, for instance, that a street once perfectly respectable becomes full of brothels and thieves' lodging-houses. The action of the magistrates may be just as necessary to prevent the renewal of a licence in respect of a public-house in such a locality as to refuse one in the first instance, and cases of a like kind must be perpetually occurring.

I have considered the Acts apart from authority, but it seems to me that there is direct authority in favour of the view I take of the effect of the legislation. In *Reg.* v. *Smith* (1) it was held by Cockburn, C.J., and Mellor, J., that under 9 Geo. 4, c. 61, and the Act of 1872 the discretion of the justices in cases of applications for renewal was as unqualified as in cases of applications for new licences. That case was decided after the Act of 1874 was passed, viz., in 1878, and I can find no case since then which casts any doubt upon this view of the law. It was argued that the case of *Reg.* v. *Justices of Market Bosworth* (2) is an authority to the contrary. I do not think so. In that case the justices had decided against the applicant on the ground that there were public-houses enough already in the neighbourhood. They had treated the case as one of an application for a new

(1) 48 L. J. (M.C.) 38. (2) 56 L. J. (M.C.) 96; 57 L. T. (N.S.) 56.

licence and had decided against the applicant without adjournment and without giving him an opportunity of being heard upon the point. This they could not do if he was entitled to be considered as an applicant for a renewal under s. 42. The Court held that under the particular circumstances the case fell within the decision of the Court of Appeal in *Reg.* v. *Justices of Liverpool* (1), and that it was a case of renewal, and granted a mandamus to the justices to hear the application. This is certainly no authority against the present contention.

The only shred of authority that I can find in favour of the notion that under words like those in the Act of 9 Geo. 4, c. 61, s. 1, there can be any limit to the discretion of the justices is an expression of Lord Romilly in *Day* v. *Luhke.* (2) There a vendor had contracted to sell a public-house as a going concern, possession to be given on November 21. To do this it would have been necessary to procure a transfer of the licence under 9 Geo. 4, c. 61, s. 11. The vendor had put it out of his power to apply to justices under that section. It was held that the purchaser might repudiate the bargain. In giving judgment the Master of the Rolls said: "the transfer of the licence under s. 11 is a matter of course; and no discretion at all is exercised by the justices unless they should have information that the transferee is an objectionable person" (3). He cannot mean, however, that the magistrates *have* no discretion, only that in practice they do not exercise it under such circumstances, as to which there was some evidence before him. The very exception he specifies shews that he thought they had a discretion. The words conferring jurisdiction on the justices are the same in s. 11 as those in s. 1, and nothing is said about whether the transferee is an objectionable person or otherwise. That they had the discretion in such a case was held in *Reg.* v. *Rowell* (4). *Day* v. *Luhke* (2) has been followed in *Claydon* v. *Green* (5) and *Cowles* v. *Gale* (6), and it seems to be perfectly right; but in neither of those cases is anything said to give countenance to the notion that under s. 11 the justices have not the discretion in question. It was merely that the procedure

(1) 11 Q. B. D. 638.
(2) Law Rep. 5 Eq. 336.
(3) At p. 344.
(4) Law Rep. 7 Q. B. 490.
(5) Law Rep. 3 C. P. 511.
(6) Law Rep. 7 Ch. 12.

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Wills, J.

under s. 11 was in those cases necessary to enable the contract to be carried out, and that the vendor was not in a condition to apply under that section, and I should not have noticed these cases but for the fact that in the judgment of FitzGerald, J., in the case of *Reg.* v. *Recorder of Dublin* (1) they are quoted as authorities for the proposition that licences have been by the English Courts recognised as matters of property annexed to a house. It seems to me that they really do not afford any support to that proposition. The Irish case itself was concerned with a transfer under the Irish Acts, and it is no authority with reference to the present question. "The statutes," says the learned judge, speaking of those in force in England and in Ireland respectively, "though dealing with general questions, differ in particulars so important that the decisions on them" given by the Courts of one of the two islands, "afford no real guide" in the case of questions arising in the sister island.

I do not think it necessary to discuss the enactments affecting licences for the sale of beer and other licences to which the provisions of the Wine and Beerhouse Act, 1869, s. 28, apply, as they contain a set of provisions so very different from those regulating this case that they and the decisions upon them have no direct bearing upon the present question. They do, however, suggest the remark that where the legislature meant to limit the discretion of the justices in dealing with applications for licences, it has done so in very clear and unmistakable terms, the entire absence of which in the present instance forms a striking contrast with the provisions in this respect of the Act of 1869.

In my opinion, therefore, the court of quarter sessions had jurisdiction to decide the appeal to them upon the grounds upon which they acted, and the present appeal must be dismissed.

Solicitor for appellant: *Sykes, for Watson.*

Solicitors for respondents: *Nicol, Son, & Jones, for Bolton, Kendal.*

(1) 11 Irish C. L. R. 412, 430.

H. D. W.

[IN THE COURT OF APPEAL.]

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May 9.

THE QUEEN *v.* THE LICENSING JUSTICES OF CREWKERNE.

Inn—Licence—Renewal—Insertion of Condition in Licence—Renewal of Licence subject to Condition originally inserted—Six-Day Licence, Renewal of—35 & 36 *Vict. c.* 94, *ss.* 42, 49.

Where a licence was originally granted subject to the condition under s. 49 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), requiring the licensed premises to be closed during the whole of Sunday, it can only be renewed subject to that condition, and cannot be renewed as an ordinary seven-day licence.

APPEAL from the decision of a Divisional Court (Mathew and A. L. Smith, JJ.) discharging a rule nisi for a mandamus to compel the licensing justices of Crewkerne to renew a six-day licence without inserting in it the condition that the premises should be closed during the whole of Sunday.

At the general annual licensing meeting in 1881 one Rugg applied to the justices for a licence for the sale of intoxicating liquors to be consumed on the premises, and asked the justices to insert in it a condition under s. 49 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), that the premises should be closed during the whole of Sunday. The licence was granted to him subject to this condition, and was afterwards renewed at his request as a six-day licence. In 1883 the licence was transferred to Walter Miller, who annually applied for its renewal as a six-day licence; it was so renewed down to 1887. In 1887 Miller made two applications to the respondent justices: first, for the renewal of the licence simply; and, secondly, for its renewal without the insertion of the condition. There was no opposition. The justices granted the first application, but refused to entertain the second, and a rule nisi for a mandamus to compel them to hear it was discharged by the Divisional Court. Miller appealed.

J. Paterson, for the appellant. There is only one form of licence which the justices have power to grant, and that is the licence specified in s. 1 of 9 Geo. 4, c. 61, which may for shortness be called a seven-day licence. It is true that under s. 49 of the Act of 1872 a condition may be inserted that the house shall

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be closed on Sundays, but that can only be done at the express request of the applicant himself: *Reg.* v. *Justices of Kirkdale* (1); and in inserting it the justices are performing a mere ministerial act, and not exercising the judicial discretion given to them by s. 1 of the Act of 1828. There is no special form for a six-day licence in the Licensing Acts; it is merely an ordinary licence with a short condition as to closing on Sundays indorsed on the back of it. There is, therefore, no such thing as a six-day licence, which is merely a compendious expression used for the sake of brevity. The power given to the applicant by s. 49 to ask for the insertion of the condition is given expressly in the cases of applications for "a new licence or transfer or renewal of a licence"; the condition could, therefore, only be inserted at the express request of the applicant for the renewal, and the action of the justices amounted to an attempt to annex to an ordinary licence a condition which the applicant for the renewal did not ask to have inserted. No notice of opposition to the renewal had been given, as required by s. 42 of the Act of 1872, and no objection could, therefore, be taken to the licence being renewed: *Reg.* v. *Justices of Merthyr Tydvil.* (2)

William Wills, (*Blake Odgers*, with him), for the respondents, was not called upon.

LINDLEY, L.J. I am of opinion that the decision of the Divisional Court was correct. The house had been licensed since 1881, the appellant and his predecessor being the holders of what is called a six-day licence. It is true that the licence was granted in this restricted form upon the application of the applicant himself, who desired to close the house on Sundays; but it is obvious that he gained many advantages by not being compelled to open his house on that day of the week; and it is not correct to say that the restriction was imposed by the justices. They have a perfect right to say, "We do not impose on you the condition that the house shall be closed on Sundays; but you may yourself ask for the imposition of the condition, and if you do not do so, we shall refuse to grant you a seven-day licence." This licence was renewed annually down to last October as a six-

(1) 18 Q. B. D. 248. (2) 14 Q. B. D. 534.

day licence, when the appellant made the usual application for its renewal. Now what is the meaning of applying for a renewal of a licence? It can only mean that the licence holder is applying to renew that which is in existence and is on the point of expiring, which in the present case is a six-day, and not a seven-day, licence. It has been contended by Mr. Paterson that the licence in the present case was in reality a seven-day licence, subject to the condition that the house should not be opened on Sundays; but I cannot concur in this ingenious suggestion, and I think that the justices were entirely justified in telling the appellant that if he wanted to open his house on Sunday he must make a substantive application for a seven-day licence. If he had done so they would have been able to exercise the absolute discretion as to granting it which is vested in them by the Act of Parliament. Were we to accept Mr. Paterson's suggestion that a six-day licence can be turned into a seven-day licence at the will of the applicant that discretion would be practically taken away from the justices.

BOWEN, L.J. I am of the same opinion. The appellant's counsel was correct in his contention that it is for the applicant to determine whether he shall apply for the insertion of the condition in his licence; but it must be remembered that the justices are not obliged to grant a licence in the first instance, and the applicant must therefore elect whether he shall apply for the insertion of the condition or not, being guided in his election by a consideration of the probability of which course is more likely to be successful. I will assume that he has made his election and has asked for the insertion of the condition; the licence which he then gets is a six-day licence, and is something entirely distinct and different from a seven-day licence. The Act of 1872 treats it as a different thing, and s. 49 makes use of the very definite expression "a six-day licence;" it then provides that in the case of such a licence the provisions as to Sunday closing are to apply to the premises as if the whole of Sunday were mentioned in them instead of certain hours only, and that the holder shall only pay six-sevenths of the duty to the Inland Revenue; and the section concludes by saying that the notice

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fixed on the premises shall contain certain words indicating that the licence is for six days only. The Act of Parliament distinctly makes it a six-day licence, and when an application is made for the renewal of such a licence what is it that is renewed? It can only be a six-day licence; and this view is strengthened by the provision in sub-s. 2 of s. 48 of the Act of 1872 that a licence is to be renewed by an indorsement on the licence or by the issue of a copy of the old licence. For these reasons I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Geare, Son, & Pease.*

Solicitor for respondents: *Trevenen, for Sparks & Blake, Crewkerne.*

W. J. B.

May 30.

[IN THE COURT OF APPEAL.]

GUARDIANS OF DORCHESTER UNION, APPELLANTS; GUARDIANS OF POPLAR UNION, RESPONDENTS.

Poor Law—Settlement—Married Woman deserted by Husband who never had a Settlement—Retention of Settlement taken from Parent by Child under Sixteen—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), s. 35.

A female pauper had married when above the age of sixteen, and had been deserted by her husband, who never had a settlement: she had never acquired a settlement of her own:—

Held (affirming the judgment of the Queen's Bench Division), that the pauper retained the derivative settlement which she had taken from her father while under the age of sixteen.

Guardians of Edmonton v. *Guardians of St. Mary, Islington* (15 Q. B. D. 95, 339) overruled.

SPECIAL CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11, on appeal against an order of removal.

The following were the material facts:—

On May 2, 1887, upon the application of the respondents, two justices of Middlesex made an order adjudging the last legal settlement of Eliza George and her four children to be in the parish of Fordington in the appellants' union.

The pauper Eliza George was born on February 9, 1851, in

the said parish of Fordington, and was the legitimate daughter of Stephen Balster.

At the time the pauper Eliza George attained the age of sixteen years her father was alive and had duly acquired a settlement in the parish of Plumstead, in the Plumstead Union, by renting a tenement, and occupying and being charged with and paying all rates and taxes for the same.

In September, 1878, Eliza George was married to James George, a ship's fireman, and native of Africa, who never had a legal settlement.

About January, 1887, James George deserted his wife and sailed for Japan, and the pauper Eliza George and her children became chargeable to the respondents' union.

The Court was to draw inferences of fact.

The appellants contended (1) that neither the pauper Eliza George nor her children were settled in the parish of Fordington in the appellants' union, and that the pauper Eliza George, being under the age of sixteen years at the time her father had acquired a settlement in the parish of Plumstead, took and retained that settlement by virtue of s. 35 of the Divided Parishes Act, 1876, she not having since acquired or derived any other settlement.

The respondents contended that the pauper Eliza George having been born in the parish of Fordington in the appellants' union, and never having acquired any subsequent settlement, was settled in that parish, and that being at the time of the order of removal above the age of sixteen years, she could not take the settlement of her father in the parish of Plumstead.

The question for the opinion of the Court was:—Was the order rightly made adjudging the settlement of Eliza George and her children to be in the parish of Fordington in the appellants' union.

By s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61): "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the

(1) The case also stated the facts as to the birth of the children, none of whom were born in the appellants' union, and the contentions as to their places of settlement, but as the order was admitted to be wrong as to the children if it was wrong as to the mother, it is unnecessary to insert them in this report.

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case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

The Queen's Bench Division (Mathew and A. L. Smith, JJ.) quashed the order of removal. The respondents (1) appealed.

Bosanquet, Q.C., and *F. Mead*, for the respondents. The pauper is within the prohibition of s. 35 of the Divided Parishes Act, and takes her own birth settlement. She is not within the exception in that section in favour of settlements by parentage and marriage; her husband had no settlement, and she cannot take a derivative settlement from her father: *Guardians of Edmonton* v. *Guardians of St. Mary, Islington.* (2) It cannot be that the pauper, the mother of a family, can retain the settlement which, as a child under sixteen, she had from her father.

[LORD ESHER, M.R. Why should not a man of sixty, who has wandered all over the world without acquiring a settlement, retain his father's settlement, which was his own settlement when he was under sixteen?]

If that is so, the exception would apply to every one who was once a child. The words "and shall retain the settlement so taken until it shall acquire another," apply to a child who is removed and dealt with while under the age of sixteen; being so removed and dealt with, he is to retain that settlement until he acquires another, which is the interpretation put upon them in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (3), in the Divisional Court, which was affirmed in the Court of Appeal. It is true that that judgment is not to be reconciled with *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (4), but it was decided upon the authority of *Reg.* v. *Guardians of Bridgnorth* (5), and is good law.

[They also cited *Guardians of Croydon* v. *Guardians of Reigate.* (6)]

(1) The terms "appellants" and "respondents" are used throughout this report with reference to the appeal to quarter sessions and not to that to the Court of Appeal.

(2) 15 Q. B. D. 95, 339.
(3) 15 Q. B. D. 95.
(4) 20 Q. B. D. 597.
(5) 11 Q. B. D. 314.
(6) 19 Q. B. D. 385.

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Bowen Rowlands, Q.C., and *R. Cunningham Glen*, for the appellants, were not called upon.

LORD ESHER, M.R. So great is the ingenuity shewn in the argument of removal cases that it is impossible to express one's opinion without a fear that on some future occasion some expressions in the judgment pronounced may be wrested from their context in order to give them a meaning of which, when fairly read with respect to the particular occasion on which they are used, it will be seen they are not susceptible. I will try, however, to express my opinion without retracting what I have previously said in interpreting this section.

The question here is the removal of a woman more than sixteen years old; it matters not whether she is a mother or widow; she is a woman over sixteen, and the question is just the same as it would be if she were a man. She has become chargeable, and an order has been made to remove her, and we have to say whether that order is right. She is married at the present time to a man who never obtained a settlement, and, though a wife, is the wife of a man who never had a settlement of his own. How, then, is she to be dealt with under s. 35? That section begins by saying "No person shall be deemed to have derived a settlement from any other person," and if it stopped there we could not ask what settlement she had at all; but it goes on, "except in the case of a wife from her husband;" that is to say, if this woman's husband had a settlement, she would take the same; but we cannot come to that decision with regard to her, for the husband has none. The section goes further: "and in the case of a child under the age of sixteen, which shall take the settlement of its father or of its widowed mother, as the case may be, up to that age;" we cannot, however, deal with her under that provision, for she has no father or widowed mother, and she is not under sixteen at the time of removal. This branch of the section ends by saying, "and shall retain the settlement so taken until it shall acquire another." Now what is the true construction to be put upon the section?

In the first place it means that no one shall have a derivative settlement except a wife from her husband; she is not to take

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the settlement of her husband's father, as was said in *Reg.* v. *Guardians of Bridgnorth* (1); and except also a child under sixteen. What settlement is the child under sixteen to have? The section supplies the answer; it "shall take the settlement of its father;" that is the only settlement which a child under sixteen can have under sixteen if the child has a father; the section does not use the word "may," but "shall," which makes it exclusive, and the only settlement we can deal with is the father's. Then come the words "or of the widowed mother, as the case may be;" which simply means that, if the child under sixteen has a widowed mother, it takes her settlement, whatever it may be. So far the section has dealt with a child under sixteen; does this part of the section deal with a child over sixteen? What are the very next words used? "And shall retain the settlement so taken until it shall acquire another." Now this cannot mean that it is to retain the settlement while under sixteen; that would be mere tautologous nonsense; it means that the child it is referring to has been under sixteen, but is over sixteen when it is to be removed. Now up to sixteen that child has its father's settlement; at the moment of its reaching sixteen it has it, and it retains it from that time until it acquires another. It is suggested that a child could acquire a settlement under sixteen; but that is entirely negatived by the expression "*shall* take" in the former part of the section. Therefore the latter part applies to persons over sixteen at the date of removal, and we may look at the settlement they had when they were sixteen, which settlement they must retain until they acquire another for themselves.

Now in the present case it is found as a fact that when the pauper was sixteen, her father's settlement was at Plumstead. She is therefore within the very words of the statute. She had her father's settlement when she reached the age of sixteen, she has acquired none since, and she therefore retains her father's settlement which she had at sixteen. In coming to this conclusion I differ from nothing that I have said before. The pauper does not come within the exception of being under sixteen at the time of removal; she might have had a settlement from her

(1) 11 Q. B. D. 314.

husband, but he had none: and as she had one (her father's) at sixteen, and never acquired another, she retains it. The only case with which our present decision is in conflict is that of *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (1); it is in entire conformity with *Reg.* v. *Guardians of Bridgnorth* (2), though there are doubtless observations in that case which might, if looked at apart from the particular facts of the case, be regarded in more ways than one. We there went through the section item by item, but we said nothing that in any way contradicted what we now say, that the last clause of the first part of the section is applicable to persons over sixteen at the time of adjudication, but who had a settlement when under sixteen.

It may be granted that the decision of the Divisional Court in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (3) was to a contrary effect, and that decision was undoubtedly affirmed in the Court of Appeal. I desire to say a few words about that affirmation. It was stated to us that the case was the same as *Reg.* v. *Guardians of Bridgnorth* (2), a statement which was not denied by the other side, and upon that view the decision of the Divisional Court was affirmed in the Court of Appeal. The case of *Reg.* v. *Guardians of Bridgnorth* (2) was rightly decided, and upon the assumption that the cases were identical our decision in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (4) is right; but upon any other assumption it is wrong. We now have the later case of *Guardians of Highworth and Swindon* v. *Guardians of Westbury-on-Severn* (5), which conflicts with *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (1); one case decides one way, the other decides the other, and we must adopt the one that we think right. The decision we think right is that in the *Highworth Case* (5), with which infinite pains were taken, and I stand by what was said there. The following passage occurs in the judgment in that case: "Previously to the passing of this statute great expenses were often incurred by parishes in tracing remote derivative settlements and difficult steps in family pedigrees; and it was

(1) 15 Q. B. D. 95, 339.
(2) 11 Q. B. D. 314.
(3) 15 Q. B. D. 95.
(4) 15 Q. B. D. 339.
(5) 20 Q. B. D. 597.

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with a view to obviate this mischief that the 35th section was introduced into the Act, which at a stroke prohibits any question of a derivative settlement being entered upon beyond the two derivative settlements expressly mentioned." Now that is what was decided in *Reg.* v. *Guardians of Bridgnorth* (1), that a person never could have a derivative settlement beyond the two that are expressly mentioned in the section. And the judgment goes on to say: "But the provision with regard to the child is most important. It is only while the child is under sixteen that it is to be capable of taking the derivative settlement of the father or widowed mother; any settlement acquired by the parents after the child attains sixteen is not to be communicated to the child, but the child is to retain the derivative settlement it had when it attained sixteen until it acquires another." Those words govern the case of Eliza George, and I decide the present case in conformity with the judgment to which I have just referred. After a person ceases to be a child he retains the derivative settlement he had at sixteen until he acquires another. That being so, the order which removed the pauper to her birth settlement is wrong. As regards the children there has been no argument, it being admitted that if the order is wrong as to the mother, it is equally wrong as to them. The order must be quashed.

It must be understood that we think that our decision in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (2) was an oversight, and that that case was wrongly decided in the Divisional Court.

My brother Lopes, who was obliged to leave the Court before the conclusion of the arguments, authorizes me to say that he concurs in our decision.

LINDLEY, L.J. We have to decide what is the settlement of Eliza George, who is between thirty and forty years old, and is a married woman, but not a widow, and who has a husband alive, who has deserted her. On reading s. 35 of the Divided Parishes Act, it is impossible not to see that it is so worded as to be difficult to construe, and, in fact, difficulties meet us at almost every

(1) 11 Q. B. D. 314. (2) 15 Q. B. D. 339.

turn. There are two exceptions in the section to the general abolition of derivative settlements—the settlement derived by a wife from her husband, and that of a child under sixteen from its parent; and it was held in *Reg.* v. *Guardians of Bridgnorth* (1) that the word "child" must be interpreted with reference to the time when the Court has to deal with the question of the removal of the individual. Then follows the provision that a child under the age of sixteen is to take the settlement of its father or of its widowed mother up to that age, which does not apply to the present case, and the first part of the section concludes by saying that "it shall retain the settlement so taken until it shall acquire another." Now what is the meaning of that expression? It cannot mean that it is to retain that settlement until, as a child, it acquires another; it can in my judgment only mean that a child, having a settlement at the age of sixteen, is to retain that settlement even if it lives to a hundred, unless it acquires another. This clause does not relate exclusively to children in the popular and ordinary meaning of that word, for the child is not to retain its settlement until it ceases to be a child, but until it acquires another, which in a very possible case may be for ever. This seems to me to be the clear meaning of the language of this part of the section, and I am unable to give any other interpretation to it. It is said, as was said in *Reg.* v. *Guardians of Bridgnorth* (1), that we must look through the whole life of the person whose settlement is being determined, to see what is the settlement which is to be retained; but it is clear in the present case that, though the pauper is no longer a child, she acquired a settlement as a child, and still retains it, and her settlement can only be where it was when she reached the age of sixteen.

I am alive to the fact that our decision in the present case is not consistent with the previous decision of the Court of Appeal in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (2). But that case was decided on the erroneous supposition that it was in all respects similar to *Reg.* v. *Guardians of Bridgnorth* (1), an assumption which was made per incuriam, and which led to the formal approval of the judgment of the Divisional Court.

(1) 11 Q. B. D. 314. (2) 15 Q. B. D. 339.

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Lindley, L.J.

The more recent decision of *Guardians of Highworth and Swindon* v. *Guardians of Westbury-on-Severn* (1) is entirely consistent with our present decision, and in fact requires that we should decide as we are now doing. And the judgment in *Reg.* v. *Guardians of Bridgnorth* (2) is also consistent with it, when that decision and the grounds on which it was arrived at are carefully looked at, although at first sight there are passages in the judgments there delivered which seem somewhat in conflict with what we are now deciding. The true construction of the section is that which is put upon it in *Guardians of Highworth and Swindon* v. *Guardians of Westbury-on-Severn* (1), and not that which is to be inferred from the decision in *Guardians of Edmonton* v. *Guardians of St. Mary, Islington.* (3)

Appeal dismissed.

Solicitors for appellants: *Lucas & Ward, for A. H. Lock, Dorchester.*

Solicitor for respondents: *J. W. Marsh.*

W. J. B.

May 29; *June* 4.

OVERSEERS OF THE POOR OF MANCHESTER *v.* HEADLAM AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Poor-rate—Distress Warrant—Rate for Lands not in occupation of Person assessed—Jurisdiction and Discretion of Justices.

Upon a summons before justices to enforce a poor-rate against a railway company, it appeared that property occupied by the company had been assessed by the description "offices and land with rails," but that in estimating the amount of the rate the overseers had treated certain buildings as being in the occupation of the company which were not in fact in their occupation. The company had not appealed against the rate:—

Held, that the objection being matter of appeal and the rate good on the face of it, the justices were bound to issue a distress warrant.

Crease v. *Sawle* (2 Q. B. 862) followed.

ORDER obtained by the overseers of the poor of the township of Manchester under rule 80 of the Crown Office Rules, 1886, calling upon the stipendiary magistrate of Manchester and the London and North Western Railway Company to shew cause

(1) 20 Q. B. D. 597. (2) 11 Q. B. D. 314.
(3) 15 Q. B. D. 95, 339.

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why the magistrate should not issue his distress warrant for 469*l.* 10*s.* 4*d.*, the amount of a poor-rate made upon the company in the township of Manchester in June, 1887.

The subject of the assessment was part of the Victoria Station, Manchester. The premises were described in the rate-book as owned and occupied by the London and North Western Railway Company, and as consisting of "offices and lands with rails" of the gross annual value of 2600*l.* and the rateable value of 2167*l.*, rated to a poor-rate of 4*s.* 4*d.* in the pound at 469*l.* 10*s.* 4*d.* The company did not appeal against the rate, and it was not denied that the description of the premises was accurate. The company, however, disputed their liability, and at the hearing of the summons before the magistrate it was objected on their behalf that the premises were valued at too high an amount, and that a portion of them was at the time of the making of the rate let to another railway company at a rent of 73*l.* a year, and in the occupation of that company. The magistrate refused to issue a distress warrant.

Bosanquet, Q.C. (with him, *E. Sutton*), shewed cause. There was no jurisdiction to issue a distress warrant. It was admitted before the magistrate that part of the property rated was not in the occupation of the London and North Western Railway Company. As regards this part of the property rated, therefore, the rate was invalid. Had a levy taken place under a warrant issued in respect of such invalid rate, the company might have brought an action of replevin. [He cited *Governors of the Bristol Poor* v. *Wait* (1); *London and North Western Ry. Co.* v. *Buckmaster*. (2)]

Gully, Q.C., and *Smyly*, for the applicants. The applicants are entitled to an order for the issue of the warrant. The objections taken before the magistrate were objections to the rate and matters of appeal. The company not having appealed, the duty of the magistrate was purely ministerial. He was bound, unless the rate was bad on the face of it, to issue the warrant. The premises were correctly described as "offices and land with rails." Over valuation and non-occupation could not be raised as objections unless they appeared on the face of the rate. [They cited

(1) 1 A. & E. 264. (2) Law Rep. 10 Q. B. 70.

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Milward v. *Caffin* (1); *Reg.* v. *Bradshaw* (2); *Marshall* v. *Pitman.* (3)]

Cur. adv. vult.

The judgment of the Court (Wills and Grantham, JJ.) was delivered by

WILLS, J. In this case the overseers of the poor have assessed to the poor's rate property occupied by the London and North Western Railway Company at Manchester by words of general description, viz., "offices and lands with rails." The company have not appealed, but have refused to pay the rate, and application has been made to the learned stipendiary magistrate to issue a warrant of distress for the amount. On the hearing of the summons before him it was elicited that in estimating the amount of the rate the overseers had treated some station buildings as in the occupation of the railway company which were not in fact in their occupation; and on this ground the learned stipendiary magistrate refused to issue his warrant of distress: and the application with which we have to deal is one for an order in the nature of a mandamus to him to do so.

It is undoubted law that a poor-rate made upon a person in respect of property which he does not occupy, although unappealed against, will not support a distress made upon that person in respect of the property which he does not occupy: and it may be conceded on the authority of the *London and North Western Ry Co.* v. *Buckmaster* (4), that if one entire assessment be made in terms upon property which he does occupy, and upon other property which he does not occupy, so that upon the true state of facts being ascertained it is impossible to satisfy the description in the rate-book without including property which he does not occupy, the rate will be bad and ought not to be enforced.

This is, however, a very different case from the present one, in which the property actually occupied by the persons rated fulfils the description appearing upon the rate-book. When the case was argued before us we were under the impression that the very point under discussion had been decided long ago, and the point

(1) 2 W. Bl. 1330.
(2) 29 L. J. (M.C.) 176.
(3) 9 Bing. 595.
(4) Law Rep. 10 Q. B. 70.

appears to us to be completely covered by authority, though the case does seem somehow not to have found its way into what one would be disposed to think its natural place in the ordinary text-books. The case of *Crease* v. *Sawle*, in the Exchequer Chamber (1), is a conclusive authority that, under such circumstances, the rate, being good on the face of it, cannot be impugned in an action of trespass for levying a distress in respect of the rate.

In that case the plaintiff was rated under two separate assessments for "tolls of tin." He had granted two separate mining leases. Under the first he received a money payment in respect of every ton of ore raised; under the second he received payment in kind, taking a portion of the ore itself. The Court of King's Bench had held (and the Exchequer Chamber agreed with them) that, in respect of the lease under which a money payment was reserved, the lessor was not rateable, because he occupied nothing, but that in respect of the lease under which he took a portion of the soil, he was an occupier of land within the statute of 43 Eliz., and therefore rateable. In the rate-book he was entered twice over as occupier, and in each instance in respect of "tolls of tin," but there was nothing on the face of the rate to connect either entry with either lease. Two distress warrants were obtained, and one distress was levied. It was objected that the rate, so far as it related to the tolls under one of the leases, was bad, and that there was one distress which was therefore bad, and *Milward* v. *Caffin* (2) was relied upon, a case which the present respondents contended was in their favour; but the Court disposed very summarily of this objection. Parke, B., said, "The rate does not on the face of it shew that it was made in respect of this property at all;" and Lord Abinger added, "For a mere excess in amount the remedy is by appeal." And in giving the considered judgment of the Court, Tindal, C.J., said: "If the plaintiff was rateable it is not material, in this action of trespass, that he was actually rated as an occupier of toll tin for a larger sum than he ought to have been; the sole question in this action being whether he was rateable in respect of the subject of the rate," and judgment was given for the defendants.

(1) 2 Q. B. 862. (2) 2 W. Bl. 1330.

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Reliance was placed upon the *Governors of the Poor of Bristol* v. *Waite* (1); but it really has very little to do with the present question. The plaintiff in that case occupied and was rated for tenements A, B, and C; he was also rated for tenement D, which he did not occupy. Four warrants of distress were obtained, and one distress was levied. It was held, that though there might be an action for excessive distress, inasmuch as there was good right to distrain, no action of trespass was maintainable.

Milward v. *Caffin* (2) rests upon the same ground as the *London and North Western Railway Co.* v. *Buckmaster*. (3) The description in the rate could not be satisfied without including something which the person rated did not occupy, and the rate was therefore bad. But *Crease* v. *Sawle* (4) went upon the ground that, under such circumstances, the person rated being an occupier in respect of premises which fill the description, that is sufficient; and we think the learned reporters were well justified in putting as the head-note that "the Court will not in an action of trespass" in such a case "inquire whether a part of the rate was or was not for tin toll in the plaintiff's occupation, some tin toll appearing to be in his occupation, and the amount being only matter of appeal."

The objection being matter of appeal, the rate unappealed against ought to be enforced. It would be very unfortunate if it should be otherwise, and if by reason of an error, possibly of the most trifling kind, made by the overseers in the amount of property which they supposed to be in the occupation of a particular individual, he, after having forborne to avail himself of an ample and satisfactory remedy for any error to his prejudice in the rate, could evade payment of the poor-rate altogether. One cannot conceive a greater encouragement to improper litigation; and we are very glad to find that there is no authority for such a proposition, and distinct authority to the contrary. The order asked for must be granted.

Order absolute for warrant to issue.

Solicitor for the applicants: *G. F. Johnson.*

Solicitor for the stipendiary magistrate and the company: *C. H. Mason.*

(1) 1 A. & E. 264.
(2) 2 W. Bl. 1330.
(3) Law Rep. 10 Q. B. 70.
(4) 2 Q. B. 862.

H. D. W.

BAYNTON *v.* MORGAN.

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April 19, 20; *May* 9.

Landlord and Tenant—Assignment—Surrender by Assignee of Part of Premises —Covenant to pay Rent—Liability of Lessee.

The plaintiff demised a house and premises for a term of years by deed containing a covenant by the lessee to pay the rent reserved. The lessee assigned the term, and the assignee surrendered a small portion of the premises, upon which was a scullery, to the plaintiff who, in consideration therefor, paid the assignee 25*l.* and built for him a new scullery of equal value upon another part of the premises. The value of the premises was not lessened, nor were they substantially altered, by reason of the surrender:

Held, upon those facts, that the lessee was still liable upon his covenant to pay the rent.

APPEAL from the County Court of Southwark.

The facts and arguments sufficiently appear in the judgments.

Jelf, Q.C., and *H. Terrell*, for the defendant.

Channell, Q.C., and *Jason Smith*, for the plaintiff.

The following authorities were cited, in addition to those mentioned in the judgments: *Moule* v. *Garrett* (1); *Twynam* v. *Pickard* (2); *Bliss* v. *Collins* (3); *Upton* v. *Townend* (4); Vin. Abr. tit. Covenant, A., s. 10; tit. Apportionment, A., ss. 10, 11; Brooke's Abr. tit. Apportionment. pl. 7; 2 Coke, Instit. 504.

Cur. adv. vult.

1888. May 9. A. L. SMITH, J. On May 21, 1878, the plaintiff by deed under seal demised to the defendant a house and premises situated in Bath Street, Camberwell, for the term of twenty-one years from March 25 then last past, at the yearly rent of 50*l.*, payable quarterly, and in the lease the defendant covenanted that he would duly pay the rent upon the respective quarter-days to the plaintiff. The lease was in ordinary form and, in my opinion, nothing turns upon the phraseology of it.

On January 3, 1879, the defendant assigned all his interest in the term to Thomas Rowland Evans, who entered upon the premises and paid the rent. On October 9, 1882, Evans, for the

(1) Law Rep. 5 Ex. 132; 7 Ex. 101.
(2) 3 B. & Ald. 105.
(3) 5 B. & Ald. 876.
(4) 17 C. B. 30.

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sum of 25*l.* and other consideration, surrendered to the plaintiff a small portion of the premises, and I take it as a fact established in this case that the fair rent apportionable for the area so surrendered to the plaintiff, assuming that there were no other considerations in the case, is 4*l.* per annum. Evans subsequently assigned his interest in the term to Charles Morgan (not the defendant), who in December, 1887, became bankrupt.

The plaintiff thereupon brought the present action against the defendant upon his covenant contained in the lease of May 21, 1878, and claimed a quarter's rent, due September, 1887, viz., 12*l.* 10*s.*, less 1*l.*, the apportioned rent of the plot surrendered as aforesaid. The county court judge held for the plaintiff, and the defendant appealed.

It was contended by Mr. Jelf, on behalf of the defendant, that the covenant sued on was a personal covenant to pay a stipulated sum of money, and that consequently all or none of the money covenanted to be paid could be recovered by action upon such covenant. He insisted that where an assignee of a lessee surrendered part of the subject-matter of the demise to the lessor without the consent of the lessee the personal covenant of the lessee contained in the lease to pay rent was gone, for, said he, the covenant of the lessee was to pay the rent for the whole of the premises demised, and not for that part left after surrender by the assignee. He said that such a surrender was either an eviction of the lessee by the lessor, or such a failure of the consideration or alteration of the contract as to create a good defence to an action on the covenant. I cannot agree with him in his propositions.

As to its being an eviction, I am clearly of opinion that a lessee, by assigning all his interest in the term to an assignee, empowers the assignee, if he so desires, to surrender to the lessor all or any part of the demised premises, and that such a surrender accepted by the lessor is not in law an eviction of the lessee by the lessor. To constitute an eviction at law the lessee must, to use the pleader's language, establish that the lessor without his consent and against his will wrongfully entered upon the demised premises and evicted him and kept him so evicted. How can it be said, when the lessee has clothed the assignee with full power

to agree with the lessor as to a surrender of the whole or any part of the premises assigned, that upon such agreement made, the lessor has wrongfully entered upon the premises and evicted him, the lessee? It seems to me impossible so to hold. On the contrary, the lessor has, with the consent of the lessee, rightfully entered, and, as to evicting the lessee, he was not upon the demised premises and had no right to be there when the lessor re-entered.

If, however, the assignee surrenders to the lessor under such circumstances that the effect of the surrender is to operate as a surrender at law of the original tenancy and a new demise of the part retained, then I should be of opinion that, inasmuch as the term out of which the rent was created had come to an end, the lessee was exonerated from further performing the obligation of his covenant. The term would have ceased to exist and the covenant also. That a mere surrender of a small part of the premises demised does not create a surrender by operation of law of the original tenancy and a creation of a new tenancy of the part retained is clear. The case of *Holme* v. *Brunskill* (1) in the Court of Appeal is express upon this point. In that case the plaintiff had let to a tenant a farm of 234 acres and some rights of pasturage on upland fells together with a flock of sheep at the rent of 35*l.* a year. By agreement the tenant subsequently surrendered to the plaintiff, his landlord, a field of seven acres, part of the land demised, worth 10*l.* a year. One of the points insisted on was that this by operation of law was a surrender of the old tenancy. But Cotton, L.J., in delivering the judgment of himself and Bowen, L.J. (and in this the Master of the Rolls, Lord Esher, agreed), said: "It was, however, argued that the effect of giving up the field must be a surrender of the old tenancy. We are of opinion that this cannot be maintained, and that, notwithstanding the surrender to a landlord of part of the land demised, the former tenancy of the remainder of the farm still continues." (2)

What are the facts of the present case? At the date of the demise there was an old passage on the one side of the house used as a scullery. The plot of land upon which the scullery

(1) 3 Q. B. D. 495. (2) At p. 504.

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stood was some feet in area and was what was surrendered. In consideration of the surrender the plaintiff paid to Evans, the assignee, 25*l.* and built for him at the rear of the house, upon a small yard which there exists, a fresh scullery together with conveniences which, in the opinion of Mr. Eve the surveyor agreed upon by the parties, had this effect, that the substituted scullery was a fair equivalent in value for the original scullery surrendered, and that the value of the property was not lessened in consequence of the exchanges. What then is the result? Assuming that between the lessor and assignee a rebate of 4*l.* per annum rent was to be allowed, (but as to this, upon the facts, I do not hold that it was), we have the original lease clearly remaining, the premises of the same value as before and, in my judgment, the alteration proved to be unsubstantial.

If it be, as Mr. Jelf insists and Mr. Channell denies, a covenant to pay an agreed specific sum of money, it becomes, as it seems to me, like an undertaking to pay the amount of any other liquidated sum of money, such as a bill of exchange, to which no defence exists unless there be a total failure of consideration, as has been repeatedly held. Why, then, I ask is the defendant absolved from this covenant to pay rent? Mr. Jelf says because he cannot now have what he would have had, had there been no surrender, for he would then have been able to have turned his cart round in the backyard, which the substituted scullery now prevents. Be it so; but what right had he in or to the backyard at all after his assignment to Evans? None at all. He had parted with all his interest in the premises and had no right whatever therein. In my opinion, the lease existing, as it undoubtedly does in this case, the defendant has no defence whatever to an action upon his covenant.

As to the suggestion that he the lessee might get a vesting order under the bankruptcy of Morgan, I wish to point out that this, in my judgment, does not affect the case. At the date of the covenant and assignments no such right existed, if this be material, and it seems to me that at most it may be a benefit to the lessee, and in no way affects his obligation upon his covenant.

For these reasons, in my judgment, the plaintiff, if he had sued for it, would have been entitled to the whole 12*l.* 10*s.*, the quarter's

rent due September, 1887, and covenanted to be paid. Mr. Channell, however, says that he only asks for the 12*l.* 10*s.* minus the 1*l.* apportioned rent for the part surrendered. Why he does so I cannot understand, excepting his desire to argue an abstruse point of law, which he did uncommonly well. He says that rent issues out of every part of the land demised, that it is capable of apportionment, that, whether the action be now founded upon debt, or upon covenant to pay rent, it is apportionable, and he cites Tindal, C.J. in *Baker* v. *Gostling* (1) to shew the difference between a covenant to pay an agreed stipulated sum of money and a covenant to pay rent, and he insists that Baron Pollock in *Mayor of Swansea* v. *Thomas* (2) has so held notwithstanding what was said by Lord Ellenborough in *Stevenson* v. *Lambard.* (3) Inasmuch, however, as I am of opinion, for the reasons given above, that the plaintiff is entitled to judgment for at least 11*l.* 10*s.*, and as Mr. Channell does not ask for more, I abstain from discussing this somewhat recondite point, and moreover, holding the opinion I do, whatever I might say on the subject would be obiter, as Mr. Channell insists that all Lord Ellenborough said in *Stevenson* v. *Lambard* (3) on the point was. Upon this, therefore, I say nothing. I give judgment for the plaintiff for 11*l.* 10*s.* and dismiss the appeal with costs.

I only wish to add as to that part of the judgment of my brother Pollock (4) dealing with the extinguishment of the debt, that I agree with him if his observations are made upon the assumption that there was no covenant to pay rent; but it would seem, upon the facts stated, that there was such a covenant, and if so, I do not see how the receipt of rent by a lessor from the assignee of a lessee can get rid of the lessee's positive personal covenant to pay rent, and this is the sole observation I wish to make upon his judgment, and I make it solely because otherwise it might be said that I agree that receipt of rent by a lessor from an assignee of a lessee of itself gets rid of a covenant to pay rent, which I do not.

CAVE, J. The liability of a lessee to pay rent under his covenant—that is, his liability under privity of contract—may come to

(1) 1 Bing. N. C. 19.
(2) 10 Q. B. D. 48.
(3) 2 East, 575.
(4) 10 Q. B. D. p. 50.

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an end, first, by surrender, secondly, by failure of consideration, as e.g. by eviction or such a change as makes the subject of demise substantially a different thing from that originally contracted for.

In this case I agree there has been no surrender of the term for the reasons which my brother Smith has given, nor has there been any eviction or substantial alteration of the subject-matter of the demise.

Mr. Channell says that, no matter what the alteration of the subject-matter of the demise may be, the rent payable under the covenant may be apportioned, and that the lessee may be held liable, no matter how much of the demised premises has been surrendered, for so much of the rent as a jury may consider to be the proportionate value of the remainder. As at present advised, I am unable to assent to this proposition for the following reasons:—The liability of a lessee under his covenant after an assignment arises from express contract, no such liability being implied at law. If the liability still exists it must, I think, exist as a whole, for, as the law implies no covenant at all in such a case, it will not imply a modified covenant to suit modified circumstances, and the liability exists by virtue of the express terms of the covenant or not at all. It is not, however, necessary to decide nor must I be taken to have decided this point. It is enough for the present purpose to say that in this case there is no surrender and no failure of consideration, and therefore the plaintiff is still entitled to recover the rent covenanted to be paid. If he chooses to take judgment for a less sum, that is a matter for his own consideration only. In my judgment the county court judge was right in the result at which he arrived, and the appeal should be dismissed with costs.

Appeal dismissed; leave to appeal.

Solicitors for plaintiff: *Wolferstan & Avery.*

Solicitors for defendant: *Daniel Jones & Linnett.*

W. A.

EGG *v.* BLAYNEY. 1888 *April* 30.

Metropolis Management Acts—Paving Expenses—25 & 26 *Vict. c.* 102, *s.* 77—*Payment by Purchaser of Property—Implied Covenant against Incumbrances—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A*).

The expenses of paving a new street apportioned under s. 77 of the Metropolis Management Amendment Act, 1862, are not a charge upon the property in respect of which they are payable, and therefore if the owner sells the property while the expenses are unpaid, and conveys as beneficial owner, and the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of s. 7, sub-s. 1 (A) of the Conveyancing and Law of Property Act, 1881.

APPEAL from the Bow County Court.

The action was brought to recover from the defendant the amount of certain paving expenses, which the plaintiff had paid to the Hackney Board of Works.

In January, 1885, the board made an apportionment of paving expenses under s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), a part of which expenses was payable by the defendant as the owner of house property.

In June, 1885, an order was made for payment by instalments of the expenses so apportioned.

In July, 1885, the defendant contracted to sell to the plaintiff the property in respect of which his share of the expenses was payable.

In September, 1885, the defendant executed a conveyance of the property to the plaintiff, conveying as beneficial owner.

The apportioned paving expenses being unpaid, the plaintiff was afterwards obliged to pay the amount to the Board of Works; and he brought this action to recover the amount so paid from the defendant, under the implied covenant against incumbrances included in the conveyance by virtue of s. 7, sub-s. 1 (A), of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

The County Court Judge held that the defendant was not liable, and the plaintiff appealed.

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Spokes, for the plaintiff. The defendant conveyed as beneficial owner, and therefore by s. 7, sub-s. 1 (A) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the conveyance contains an implied covenant against incumbrances, claims, and demands, occasioned or suffered by him. By the Metropolis Management Amendment Act, 1862, (25 & 26 Vict. c. 102), s. 77, the Board of Works had power to apportion the paving expenses among the owners of the houses in the street and to accept payment by instalments, and the section further provides that "any such amount shall be recoverable from the present or any future owner of the premises." This makes the liability to these paving expenses an incumbrance, claim, or demand, on the property, against which the vendor is bound to indemnify the purchaser.

C. E. Jones, for the defendant, was not called upon.

FIELD, J. I am of opinion that the judgment of the County Court Judge was right, and ought to be affirmed.

In order to succeed the plaintiff must establish that the defendant has covenanted to indemnify him against the apportioned amount of the paving expenses, and his contention is that because the defendant conveyed the property as beneficial owner the conveyance, by virtue of s. 7, sub-s. 1 (A) of the Conveyancing and Law of Property Act, 1881, contains a statutory covenant against incumbrances, which applies to this liability. If this were a charge under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the plaintiff's contention would be correct, for that Act, by s. 257, expressly makes the expenses a charge upon the land, as was held by North, J., in the case of *In re Bettesworth and Richer*. (1) In the Act now before us, however, there is nothing which makes these expenses a charge on the land, and, therefore, it was only a claim or demand upon the defendant personally up to the time of the sale, and did not affect the land. The County Court Judge was, therefore, right in holding that it was not an incumbrance within the meaning of the statutory implied covenant.

WILLS, J. I am of the same opinion. It is clear that there is no charge upon the land in the present case, but only successive

(1) 37 Ch. D. 535.

personal liabilities imposed upon the successive owners, and therefore there is no liability under the implied covenant.

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Appeal dismissed.

Solicitor for plaintiff: *East.*

Solicitor for defendant: *Sydney C. Hadley.*

P. B. H.

THE QUEEN *v.* D'EYNCOURT AND RYAN.

April 14, 16.

Justices—Metropolitan Police Courts—Money charged to have been fraudulently obtained, Jurisdiction to order delivery of—2 & 3 Vict. c. 71, s. 29—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49) *s.* 44.

By 2 & 3 Vict. c. 71, s. 29, "if any money or goods charged to be stolen or fraudulently obtained shall be in the custody of any constable by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanor in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried or acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof."

An accused person, having been arrested by a police constable, was taken to a police station, where she was searched, and a sum of 108*l.* was found upon her, and taken possession of by the police. In the charge-sheet kept at the police station the following charge against her was entered:—"Fraudulently obtaining on the 10th instant the sum of 5*s.* from Miss M., and also the sum of 5*s.* from Miss B., by representing that she (the prisoner) was collecting subscriptions for the children's treat of St. Peter's, Eaton Square, and further with endeavouring to procure charitable contributions by false pretences." On the following day she was brought before a metropolitan police magistrate, who had the charge-sheet before him, and convicted her summarily in respect of the two first offences specified therein, and sentenced her to two consecutive terms of imprisonment. At the hearing, in addition to Miss M. and Miss B., three other ladies were called who proved that she had obtained from them various small sums, amounting to about 2*l.* 5*s.*, by making similar fraudulent representations:—

Held, upon those facts, that the money found upon the prisoner was not money "charged" before the magistrate to be stolen or fraudulently obtained within the meaning of s. 29, and therefore that he had, after the conviction, no jurisdiction to make an order under that section for the delivery to her of the whole of the 108*l.* by the constable in whose custody it had remained.

BY THE COURT:—The word "charged" in s. 29 is used in its technical legal

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sense, and imports a formal charge made before a magistrate against an accused person of having stolen or fraudulently obtained specific goods or money, which charge the accused is called upon to answer, and is given an opportunity of answering.

ORDER, obtained on behalf of the Commissioner of Police, calling upon L. C. T. D'Eyncourt, Esq., one of the magistrates of the Westminster police court, and upon Mary Ryan, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of two several orders respecting a sum of money taken from Mary Ryan, and in the custody of one of the chief inspectors of the Metropolitan Police Force.

The facts appearing from an affidavit made on behalf of the Commissioner were as follows:—

On June 15, 1886, Mary Ryan was taken into custody by a constable of the metropolitan police, and having been taken to the Rochester Row police station, was there searched, and upon her was found a large packet secured in a pad across her chest. That packet contained four smaller ones, in which were found 103*l.* in gold and a bank-note for 5*l.* There were also found upon her some jewellery, and a purse containing 9*s.* 6*d.* The prisoner said, with reference to the note and gold found in the large packet, that it belonged to her; that she brought 200*l.* over from Ireland about twelve months ago and had been living on it since, and that the packet had not been opened for the last twelve months. On that evening she was told by one of the police sergeants that she would be charged with obtaining 5*s.* by false pretences from a lady at an address in Grosvenor Gardens.

On the following day she was brought before the magistrate at the Westminster police court. In the charge sheet, which was filled in by the police at the Rochester Row Station, and placed before the magistrate at the hearing, the following entry under the head "charge" was made with respect to Mary Ryan's case:—"Fraudulently obtaining on the 10th instant the sum of 5*s.* from Miss Magniac, and also the sum of 5*s.* from Miss Burne, by representing that she (Mary Ryan) was collecting subscriptions for the children's treat of St. Peter's, Eaton Square, in the parish of St. George's, Hanover Square, and further with

endeavouring to procure charitable contributions under false pretences." Miss Magniac and Miss Burne were called, and each of them proved that the prisoner on the 10th of June had obtained from her 5*s.* by the representation (which was proved by other witnesses to be false) specified in the charge-sheet. Three other ladies were called who proved that the prisoner had at different times obtained sums of money—amounting to about 2*l.* 5*s.*—from them by representations of a similar character.

On June 23, the magistrate, after a remand, convicted her summarily of two separate offences, and sentenced her to three months imprisonment with hard labour for each offence, the terms to be consecutive. In the register kept at the Westminster police court, in which is entered by the chief clerk the record of summary convictions, the following entries were made with respect to the case of Mary Ryan:—under the head, "Nature of offence or of matter of complaint," was entered "fraud"; and under the head, "Minute of adjudication," was entered "three months each with hard labour on two separate charges under Vagrant Act." The convictions were not drawn up.

On January 18, 1887, upon an application made on behalf of Mary Ryan in the matter of "Mary Ryan, complainant, and the Commissioner of Police, defendant," the magistrate made an order "that the defendant shall deliver to the complainant the jewellery originally taken from her, together with the sum of 58*l.* 9*s.* 5½*d.*, being a part of the sum of 108*l.* 9*s.* 5½*d.*, also taken from the said complainant," and that "the said defendant shall satisfy the claims of divers persons admitted by the claimant, amounting to 8*l.* 9*s.* 0*d.*, and the said defendant shall retain possession of the further sum of 41*l.* 11*s.* 0*d.* pending inquiries as to other claimants."

The Commissioner of Police complied with the terms of this order.

On January 9, 1888, the magistrate made a further order "that the Commissioner give up balance in hands of police, namely, 41*l.* 11*s.*, within twenty-one days."

On that occasion the Commissioner appeared by counsel, who objected that the magistrate had no jurisdiction to make the order, and one of the sergeants of the Metropolitan Police gave

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evidence that since the convictions he had made inquiries, and as the result of them he believed that Mary Ryan had obtained sums of money from a number of persons by falsely representing that she was collecting for charities, which sums, so far as he had ascertained, amounted to about 11*l.*

The order nisi for a writ of prohibition was obtained on behalf of the Commissioner of Police on January 27, 1888.

F. Mead, (*Poland*, with him), for the magistrate, shewed cause. The magistrate had jurisdiction, under 2 & 3 Vict. c. 71, s. 29, to make the order of January 9, 1888. He was justified in convicting the accused of any charge which the evidence before him warranted: *Reg.* v. *Hughes* (1); and he was not bound to confine himself to the charges entered by the police in the charge-sheet, which is an informal document kept by the police for their own purposes, and not recognised by any statute. The evidence of the three ladies, other than Miss Magniac and Miss Burne, shewed that the accused had been, within the language of s. 4 of the Vagrant Act (5 Geo. 4, c. 83), a "person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind," under false or fraudulent pretences; and the magistrate, therefore, had evidence before him upon which he might come to the conclusion that the whole of the money found upon the accused had been obtained by fraud. The fact that those three ladies were called by the police is some evidence that she was charged with obtaining other sums than the two sums of 5*s.* by fraudulent representations. The order of January 18, 1887, was made under s. 44 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). It is not proposed, however, on behalf of the magistrate to attempt to support either of the orders under that statute, but the first order has been obeyed by the Commissioner of Police, and is understood not to be in question here.

Clavell Salter, for Mary Ryan, also shewed cause. The Court has a discretion whether or not to issue a writ of prohibition, and upon certain facts which exist in this case [counsel stated them] it would be a hardship upon Mary Ryan if the Court should

(1) 4 Q. B. D. 614.

exercise that discretion otherwise than in her favour. It is submitted also that the orders in question can be supported under s. 44 of the Summary Jurisdiction Act, 1879. (1)

As to s. 29 of 2 & 3 Vict. c. 71, it is not a necessary element in order to give the magistrate jurisdiction that the goods or money should have been charged to be stolen or fraudulently obtained. A distinction is intended to be drawn between the case of specific goods or money charged to be stolen or fraudulently obtained, and the case of a person charged with stealing or fraudulently obtaining possession of any goods or money. In the latter case the magistrate has jurisdiction "if such person shall have been tried and found guilty, but the property in question shall not have been included in any indictment upon which he shall have been found guilty." It is submitted that the effect is to give the magistrate jurisdiction in all cases in which a person has been convicted, otherwise than upon an indictment, of stealing or fraudulently obtaining any goods or money. If that construction be correct, it covers the present case. It is also contended that the property in question is brought within the opening words of s. 29 as being goods or money charged to be stolen or fraudulently obtained and in the custody of the police "by virtue of any warrant of a justice."

[WILLS, J. By "any warrant of a justice" a search warrant is meant.]

The expression includes also a warrant of conviction, and the clause applies where after conviction the goods or money in the custody of the police are charged—i.e., alleged by them—to have been stolen or fraudulently obtained.

Danckwerts, for the Commissioner of Police. The order nisi for a prohibition should be made absolute. If the convictions

(1) 42 & 43 Vict. c. 49, s. 44: "Where any property has been taken from a person charged before a court of summary jurisdiction with any offence punishable either on indictment or on summary conviction, a report shall be made by the police to such court of summary jurisdiction of the fact of such property having been taken from the person charged and of the particulars of such property, and the Court shall, if of opinion that the property, or any portion thereof, can be returned consistently with the interests of justice and with the safe custody of the person charged, direct such property, or any portion thereof, to be returned to the person charged, or to such other person as he may direct."

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were under the Vagrant Act it is clear that the money found on Mary Ryan was not "charged to be stolen or fraudulently obtained" within the meaning of s. 29 of 2 & 3 Vict. c. 71. The clause in s. 4 of the Vagrant Act constitutes two separate offences: (1.) "Going about as a gatherer or collector of alms," i.e. begging as a habit in an idle and disorderly manner: see *Pointon* v. *Hill* (1); and (2.) "endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence." It is clear that a person accused of either of those offences is not charged with fraudulently obtaining specific goods or money.

If s. 29 applies to summary convictions at all, it is clear that there must have been a charge of fraudulently obtaining specific goods or money made before the magistrate who convicted in order to found the jurisdiction to make orders with respect to the delivery of such goods or money. The charge must be a formal charge. The word "charged" is not used in the popular sense as having the meaning of "alleged," but in its technical legal sense. It is so used in Jervis's Act (11 & 12 Vict. c. 42), s. 17, which applies to all cases in which "any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence; and in 11 & 12 Vict. c. 43, s. 9, which speaks of "the party charged by information." But whether the word "charged" be used in a popular or in a technical sense in s. 29 of 2 & 3 Vict. c. 71, is immaterial in the present case, because it is clear that at the hearing before the magistrate no charge or allegation was made, nor any evidence given, that the specific money found upon the accused was stolen or fraudulently obtained.

The provision in s. 29 giving the magistrate jurisdiction if the person charged with stealing or obtaining possession "shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty," applies to cases in which a person is charged with stealing or obtaining possession of various things, one only of which is included in the indictment upon which he is tried. It does not apply to cases in which there has been no

(1) 12 Q. B. D. 306.

indictment. As to s. 44 of the Summary Jurisdiction Act, 1879, that section obviously applies only before conviction. That is shewn by the provision that before making the order the Court must be satisfied that the property can be returned "consistently with the interests of justice, and with the safe custody of the person charged."

April 16. FIELD, J. In this case an order nisi has been obtained calling upon one of the magistrates of the Westminster police court, and upon Mary Ryan, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of two orders made by the magistrate. [The learned Judge stated the effect of the orders, and the facts, previously stated, with respect to the arrest of Mary Ryan, the property found upon her, her statement, and the entries made in the charge-sheet at the Rochester Row police station.] On the charge-sheet, therefore, she was charged with three offences—the first two being separate offences of the same character, committed on one day, of obtaining sums by false pretences, and the third being a charge of endeavouring to procure charitable contributions by false pretences. In the minute of convictions the charges of which she was convicted were stated to be under the Vagrant Act, 5 Geo. 4, c. 83. The only section of that Act which applies is the 4th, which enacts that "every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind under any false or fraudulent pretence," shall be guilty of an offence under the Act. She was not charged under that section as a person "going about as a gatherer or collector of alms." The two first charges on the charge-sheet were not charges under the Vagrant Act; and on the third or further charge, which was made under that Act, the learned magistrate discharged her, but I think it is clear that he convicted on the two first charges of obtaining two separate sums of 5*s.* by false pretences. Several witnesses were called before the magistrate—in particular the two ladies from whom respectively she had obtained the two sums of 5*s.*, and who proved that she had obtained those sums from them. There were also three other ladies called who proved that she had obtained money from

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them by pretences of a similar character, but I come to the conclusion that the conviction was in respect only of the two offences proved by Miss Magniac and Miss Burne.

It is sought to support the orders made by the magistrate under the provisions either of 2 & 3 Vict. c. 71, s. 29, or of 42 & 43 Vict. c. 49, s. 44. The Courts for a very long time have had jurisdiction to make orders for the disposition of property included in indictments tried before them. That useful power was given by statute, and the jurisdiction has been extended by subsequent legislation to other cases. The learned counsel who appeared for the magistrate preferred to rely on the provisions of 2 & 3 Vict. c. 71, s. 29, in support of the magistrate's orders, and admitted that they could not support them under s. 44 of 42 & 43 Vict. c. 49. The first order seems to have been made specifically under s. 44 of 42 & 43 Vict. c. 49; the second, as the language of it indicates, was made under s. 29 of 2 & 3 Vict. c. 71. It is therefore necessary to look at the language of that Act in order to see what is the jurisdiction conferred. It is conferred upon the magistrate committing, or trying under summary jurisdiction. It was conferred in view of the fact that several charges were frequently made against a man before a magistrate, and the accused was committed upon all or some of those charges, but it frequently happened that indictments were not preferred in respect of all the charges upon which he had been committed; or if indictments were preferred in respect of all, the judge at the trial sometimes did not think it necessary to try more than one of such indictments, and directed the other or others to stand over. When that took place the judge at the trial had no jurisdiction to deal with property which had been the subject of a charge before the committing magistrate, but had not been included in any indictment on which the prisoner was acquitted or found guilty, and therefore it was that this further jurisdiction was given. It is not a general police court jurisdiction; it is an exceptional jurisdiction given to the magistrate to be exercised under certain carefully specified circumstances. It is clear upon the language of s. 29, and it was conceded in argument by counsel for the magistrate, that one element necessary to give the magistrate jurisdiction under that section is that the money in

respect of which an order could be made must be money which has been charged to have been fraudulently obtained by the prisoner. It seems to have been taken, though I can hardly see why, that the first order was unobjectionable. The question for discussion and decision, therefore, is whether or not, upon the facts of this case, the sum of 41*l.* 11*s.*, which is the balance claimed by the applicant here, had ever been the subject of a charge of fraudulently obtaining it. It does not matter whether the prisoner was convicted or discharged. If the charge was made, then the magistrate had jurisdiction; if no charge was made, then he had no jurisdiction whatever. It therefore becomes necessary to see what charge in fact was made against Mary Ryan, and whether that charge did, or did not, cover this sum of 41*l.* 11*s.*, or any part of it. Undoubtedly there was a charge made against her, and that charge was the one appearing upon the charge-sheet, which I have read. The well-known practice is that when the case is called on, the magistrate having before him the charge-sheets from the different police stations within his jurisdiction, the contents of the column headed "charge" in the charge-sheet referring to the particular case is read out to the person charged, and he is called upon to answer. That was all that occurred in the present case.

From the cases of *Turner* v. *Postmaster-General* (1), *Blake* v. *Beech* (2), and *Reg.* v. *Hughes* (3), there is no doubt that at the hearing a charge may be preferred which has not been included in any warrant, or in any charge made at the police station. In the present case, therefore, if there had been any evidence to support the new charge which it is suggested might have been made, and if the police constable at the hearing had said, "I further charge her with having fraudulently obtained the whole of the money found in her possession in a way similar to that in which she obtained the two sums of 5*s.*," I should have had no doubt but that the whole of the money had then become the subject of charge so as to make s. 29 apply, although no such charge had been made at the Rochester Row police station, or made in any other manner before the case came before the magistrate. It

(1) 5 B. & S. 756. (2) 1 Ex. D. 320.
(3) 4 Q. B. D. 614.

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would then have been the duty of the magistrate to have stated the nature of the further charge to the accused; to have asked her what answer she wished to make to it; and also to have asked her whether she wished the hearing of that further charge to be adjourned in order that she might have the opportunity of answering it. It is not suggested that anything of that kind occurred. The only mode in which it was sought to make out that the money in question was the subject of a charge before the magistrate was by relying on the fact that there were other witnesses called who proved that Mary Ryan had obtained from them sums of money by false pretences similar to those made in the two cases in which she was convicted. Even if that evidence could be said to be a charge in respect of her having obtained some of the money found upon her, it would only be a charge in respect of a very small amount, and would in no way have covered the sum of 108*l.* which was found upon her. I cannot in any way accept or act upon the proposition that, because witnesses were called before the magistrate who detailed acts which might be the subject of a charge, therefore the prisoner must be taken to have been charged with offences in respect of all those acts. Such a doctrine would lead to very serious consequences. Take the case of an action for malicious prosecution in which the plaintiff alleged that the defendant had made a charge which he knew to be false, and was, therefore, of necessity malicious. Could the plaintiff be entitled to say, "It is true that you gave me into custody upon such and such a charge, but at the trial the prosecution called two witnesses who stated that I had committed murder; you must, therefore, be taken to have charged me with murder"? That is, of course, an extreme case, but it illustrates the consequence of the doctrine contended for. No authority was produced for saying that a charge could be made in that way, and I am satisfied that there can be no such authority. The only remaining question with respect to s. 29 is, what is the meaning of the word "charged" in that section? Is it used in a popular, or in its known legal meaning? No doubt if the police constables had been asked at the hearing they would have said that they believed Mary Ryan had obtained the whole of the money found upon her by fraud, but that is a very different

thing from "charging" her with having so obtained it. I am of opinion that the word "charged" must be read in its known legal sense, namely, the solemn act of calling before a magistrate an accused person and stating, in his hearing, in order that he may defend himself, what is the accusation against him. I am of opinion that there was no charge within the meaning of s. 29 made against the accused with respect to the money in question in this case.

The learned counsel who appeared for Mary Ryan contended that, under the circumstances of this case, which he mentioned, we ought to exercise our discretion by refusing to make absolute the order nisi for a prohibition. But our discretion is a judicial discretion, and if the magistrate's order was made without any jurisdiction whatever, we ought not, on account of some alleged hardship to the applicant, to allow the order to stand. Mary Ryan's counsel also contended that s. 29 was intended to apply to all cases in which the money claimed was not included in an indictment. I think that the answer made by Mr. Danckwerts disposed of that contention. The intention of the clause is, that where a prisoner is charged with having stolen or fraudulently obtained various things, and only one of those things is included in the indictment upon which he is tried, to give jurisdiction to make orders with respect to the other things, but he must have still been charged before the committing magistrate in respect of them.

It was also contended that the order in question could be supported under s. 44 of 42 & 43 Vict. c. 49. That section carries still further the care and caution displayed in s. 29 of 2 & 3 Vict. c. 71. A person charged before a magistrate, who is going to commit him for trial, is up to that time presumably innocent. It is quite uncertain up to that time whether the money found upon him has been obtained by fraud or not. Under those circumstances it was thought a hardship that he should have all his money taken away from him, and be left without the means of providing for his defence. The legislature, therefore, provided that so long as the accused was not tried and convicted he ought not to be deprived of all the money found upon him, and left it to the magistrate to say what portion of that money ought to be given

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over to the accused in order to enable him to conduct his defence. That is the whole purport of s. 44, which clearly applies only before trial and conviction.

For these reasons I see no alternative but to make the order nisi for a prohibition absolute.

WILLS, J., read the following judgment:—

In this case the learned magistrate sitting at the Westminster police court has made an order that certain jewellery and money found upon one Mary Ryan, a person summarily convicted before him, and in the possession of an officer of the Metropolitan Police, shall be given up to her. A prohibition has been applied for on the ground that he had no jurisdiction to make the order, and the question for our decision is whether we are satisfied that he had no such jurisdiction.

The only enactments which are, or can be, relied upon in support of his jurisdiction are the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 71), s. 29, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 44.

With regard to the latter of these provisions, it is sufficient to say that it is clearly limited to the case of persons under charge, and to the time during which they are under charge, and has no reference to a case like the present, where the person charged has been imprisoned and released from custody upon the expiration of her term of imprisonment.

We have only, therefore, to consider the provisions of s. 29 of 2 & 3 Vict. c. 71. This section provides, "that if any goods or money charged to be stolen or fraudulently obtained shall be in the custody of any constable by virtue of any warrant of a justice, or in the prosecution of any charge of felony or misdemeanor in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried and acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party

who shall appear to be the rightful owner thereof, or in case the owner cannot be ascertained, then to make such order with respect to such goods or money as to such magistrate shall seem meet, provided always that no such order shall be any bar to the right of any person or persons to sue the party to whom such goods or money shall be delivered and to recover such goods or money from him by action at law, so that such action shall be commenced within six calendar months next after such order shall be made."

In order to give jurisdiction, several conditions must be satisfied; amongst others, the property must be in the custody of a constable. It must have been taken under a search warrant, or must be in the keeping of the constable as an incident in the prosecution of a charge against some person for having obtained the property by a felony or a misdemeanor. The property having come into the possession of the constable in the execution of a search warrant, or in the regular course of the prosecution of a criminal charge with respect to it, the magistrate may make the order, (1) if the person charged has not been found, in which case, of course, it must be made behind his back; (2) if he has been brought before the magistrate, and either summarily convicted or discharged; (3) if he has been indicted, tried and acquitted; (4) if he has been indicted, tried, and convicted but the property in question or a part of it was not included in the indictment upon which he has been found guilty—a case to which the power of the Court before whom he has been tried to grant an order of restitution does not extend.

The section, however, even without its introductory words, which I have purposely omitted for the moment, would seem to be confined to property in respect of which there is a charge before the magistrate that it has been obtained by felony or misdemeanor. Unless there is such a charge the property cannot be in the custody of the constable in the prosecution of a charge of felony or misdemeanour in respect to the obtaining thereof; and nothing can be clearer than that in the phrase, "in the prosecution of a charge of felony or misdemeanor," the expression "charge" is used in its strict technical sense of an accusation formally made, or intended to be made, before a magistrate; and such an accusation must from its very nature

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be one of a distinct and definite character, importing in respect to the manner in which such property was obtained a felony or misdemeanor known to the law, and committed at all events by somebody. In other words, the section is not satisfied unless there is a charge against someone of obtaining the property in question by a felony or a misdemeanor.

The necessity for this condition, however, is made still clearer by the fact that the section is confined by its opening words to the case of property charged to be stolen or fraudulently obtained. It is said in support of the order that "charged" here means "alleged." But if so, the word "charged" is used in two different senses within the course of four lines, which is very unlikely; and I think it also very unlikely that a word which has a very well-known technical meaning should be used in a clause dealing with procedure in a vague and popular sense which is not its own natural meaning—at all events in the mouth of a lawyer, or in the phraseology of an Act of Parliament. A person is charged with an offence when someone, whether a private person or a policeman, either appears before a magistrate to prosecute him for it, or accuses him to a magistrate, constable, or other person having lawful authority to compel him, by arrest or otherwise, to appear before a competent tribunal and answer the accusation. "Charged" is the expression habitually used in Jervis's Acts (11 & 12 Vict. cc. 42, 43) with reference to the person, and always in one of the senses I have mentioned, and it is the only phrase I know which has the same signification. It is not perhaps a happy use of language to transfer it to the property which is the subject of the charge, and to describe the property as charged to be stolen or fraudulently obtained. But it seems to me perfectly clear what was meant, and that "property charged to be stolen or fraudulently obtained" means property which someone is charged by someone with having stolen or fraudulently obtained.

What, then, are the facts in the present case to shew that the jewellery and the 108*l.* dealt with by the order of the magistrate were "charged to be stolen or fraudulently obtained?" Of what offences the magistrate convicted the prisoner we are left to guess. We are furnished with the copy of an entry in the book kept by

the clerk of the police court, and we are told that the convictions were not drawn up. But they might have been drawn up for the purpose of this decision; and whether there were convictions or not, there were warrants of commitment, or else the gaoler would not have received the prisoner into his custody and kept her at hard labour for two periods of three months each. The question is deemed of sufficient importance for the Treasury to instruct counsel to argue each side of the question, and yet we are left to speculate as to what the charges were upon which the convictions proceeded, and are asked to infer from the magistrate's notes of the evidence that they must have been something different from the charges entered at the police station on the charge-sheet when the constable who arrested the prisoner brought her into the station, there being no private prosecutor. No explanation has been offered to us why the warrants, which according to form P of the schedule to 11 & 12 Vict. c. 43, must describe the offence as in the conviction, have not been produced, or copies of them procured. We must decide the question, therefore, without this important information; and I think that it sufficiently appears that there could have been no charge that either the jewellery or the 108*l.* was stolen or fraudulently obtained.

Upon the charge-sheet there are three charges against Mary Ryan, and three only:—one of obtaining 5*s.* from A., and another of obtaining 5*s.* from B., by falsely representing that she was collecting subscriptions for a specified charitable purpose, and further with endeavouring to procure charitable contributions under false pretences. The evidence was confined to the actual obtaining of the two sums in question, and a few other small sums from certain ladies—in each case by a false pretence that the defendant was collecting money for some specified charitable purpose; but it appeared that the female searcher had found concealed about the person of the defendant the jewellery and the sum of 108*l.*, with which the magistrate afterwards dealt by the orders now under consideration. The note in the book of the police court is that the defendant was summarily convicted of two offences under the Vagrant Act, and sentenced to three months' imprisonment with hard labour in respect of each offence. The only portion of the

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Vagrant Act that is suggested to be applicable is that part of s. 4 which provides that "every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind whatsoever, under any false or fraudulent pretence," shall be liable to summary conviction and imprisonment with hard labour.

It is plain that the defendant was not convicted merely of obtaining money by false pretences, as the magistrate could not deal summarily with that charge, and he must have convicted her either of going about collecting alms under false pretences, or of endeavouring to procure charitable contributions by false pretences, or both; and I agree with my brother Field that the convictions were probably in respect of two of the small sums which were the subject of charge, though I see some difficulty in bringing the offence under the head of "endeavouring to procure," seeing that the money was actually obtained. The only importance, however, of seeing what the magistrate convicted her for is that, if it were something other than what appears upon the charge-sheet, it would indicate that he had, when the case was before him, allowed a fresh charge suggested by the evidence to be made and investigated beyond those with which the prisoner was charged in the first instance, and which are shewn upon the charge-sheet. Such a course is constantly taken, and it is legitimate when no objection is made, or when a proper opportunity is afforded of meeting any new evidence. No injustice is then done, and the defendant is put to no disadvantage by reason of the formulation of a fresh charge, either in addition to, or by way of substitution for, the charge or charges already indicated to him: *Reg.* v. *Hughes* (1); *Turner* v. *Postmaster-General.* (2) But of course there always must be, prior to adjudication, a definite charge made against the defendant, and an opportunity to answer that charge. I cannot see how upon the evidence before us we can suppose that the magistrate had before him any charge that the jewellery or the bulk of the large sum of 108*l.* was obtained by fraud. If there had been such a charge, he might have had jurisdiction; for his order does not dispose of the right, but merely operates as a protection to the constable, who in

(1) 4 Q. B. D. 614. (2) 5 B. & S. 756.

obedience to it gives up the property—it may be to a person having no title to it—and confers upon the person in whose favour the order is made a right to the present possession and to the ownership if no action be brought within six months. But it is not likely that a charge should have been made with no evidence to support it, or to indicate that more than the small sums before-mentioned had been fraudulently obtained. If it had been made, there ought to be some entry of it in the charge-sheet, or in the note-book of the police-court; and, in the absence of any evidence that such a charge was in fact made, I come to the conclusion that it was not made. Supposing that one of the charges was that of going about as a collector of alms under false pretences, *that* charge is not concerned with any specific sum or property; and no charge that could be framed under that head could, in my opinion, lay the foundation for the jurisdiction given by s. 29 of the Act of 1839.

It is urged upon us that this is a case of great hardship upon the defendant, Mary Ryan; that, after every inquiry, protracted over a space of eighteen months, no claimant has appeared to anything more than about 8*l.* out of the total sum, and that we ought, therefore, in the exercise of our discretion, to refuse the writ of prohibition. As to the 8*l.* odd, the defendant appears to have admitted that the sums of which it consisted were properly to be returned to the persons from whom she conceded that she had received them. As to the rest of the sum now in the hands of the police authorities, it seems clear, upon the facts stated to us, that it ought to be given up to Mary Ryan; and it is clear that the possession she once had would give her the right to recover the money from any one who could not shew a better title. This would be so, even if the money had been obtained by false pretences from persons who with knowledge of the facts advisedly abstained from making any claim, or if nothing could be shewn as to who was really entitled.

The possessory right may perhaps go further. But it is not necessary to express any opinion upon this point. We have no reason to suppose that the police authorities will not do what is right in the matter; and, whether this be so or not, I am of opinion that the discretion to be exercised by the Court in

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granting or refusing a writ of prohibition is a judicial discretion to be exercised upon legal grounds and with reference to considerations of a totally different nature from those I am dealing with.

In my opinion, therefore, the writ of prohibition must go.

Order absolute.

Solicitors for the Magistrate and the Commissioner of Police: *Hare & Fell, Solicitors to the Treasury.*

Solicitor for Mary Ryan: *Marcus H. Lewis.*

W. A.

June 4.

MEEK *v.* WENDT & CO.

Damages, Measure of—Principal and Agent—Warranty of Authority.

The plaintiff brought an action in England against a marine insurance company carrying on business in the United States and obtained judgment in default of appearance for 1000*l.* Negotiations for a settlement then took place between the plaintiff and the defendants, the agents of the company in England, and the defendants by mistake represented to the plaintiff in good faith that they were authorized by the company to offer 300*l.* in settlement of the plaintiff's claim. The plaintiff, relying upon the accuracy of the representation, entered into an agreement with the defendants, on behalf of the company, for the settlement of his claim for 300*l.*, but it afterwards appeared that the defendants were not authorized to make the agreement, and he was unable to enforce the performance of it. In an action against the defendants to recover damages for breach of warranty of authority, the defendants paid into court a sum representing the expenses incurred by the plaintiff in negotiating the compromise:—

Held, by Charles, J., on the authority of *In re National Coffee Palace Company, Ex parte Panmure* (24 Ch. D. 367), that the measure of damages was the loss by the plaintiff of the gain which he would have derived from the contract which the defendants warranted should be made, and that inasmuch as the judgment obtained by him was of no value (for the company had no assets in England, and the judgment could not under the circumstances be enforced in the American Courts), and the value of the plaintiff's remedy on the policy could not be estimated, the plaintiff was entitled to recover from the defendants 300*l.* in addition to the sum paid into Court.

CASE tried before Charles, J., without a jury. The facts and arguments appear in the judgment.

Bigham, Q.C., and *Joseph Walton*, were for the plaintiff.

Barnes, Q.C., and *Butler Aspinall*, were for the defendants.

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CHARLES, J. In this case, which was tried before me without a jury, at Liverpool, the plaintiff seeks to recover damages from the defendants for breach of warranty of authority, under the following circumstances:—The plaintiff was in 1887 the holder of two policies of insurance on the ship *Mindora*, effected with two insurance companies in San Francisco called the "Union" and the "Sun." Each policy was for 1000*l.*, and provided thus for payment of any loss: "Loss if any hereunder payable by Messrs. the Anglo-Californian Bank in London three days after sight of the certificate of loss approved by E. E. Wendt of London, or Richard Lowndes of Liverpool, accompanied by this policy." A loss having occurred and the companies having repudiated liability, an action was commenced in England against each company, and proceedings were duly taken for service of the writs out of the jurisdiction. The defendant companies did not appear, and judgment by default was signed for 1000*l.* against each company. Negotiations for a settlement thereupon took place between the plaintiff and the defendants, Messrs. Wendt & Co. of London, who represented the two companies in this country. A sum of 300*l.* was in the early part of 1887 offered by each company, but was refused. In August, however, the plaintiff expressed his willingness to accept that sum, and on the 26th the defendants wrote to the plaintiffs' solicitors, Messrs. Simpson & North, as follows: "As so long a time has now elapsed since the offer of our clients was first made we cannot go further into the matter just now, but have at once written to San Francisco for instructions." On September 13, the Union Company wrote to the defendants stating that they would adhere to their offer, but no answer was received from the Sun. The defendants thereupon telegraphed on September 30 to San Francisco and received an answer on October 1, which they supposed authorized them to accept the plaintiff's offer. The telegram of October 1 had not in fact been sent with the authority of the Sun. On receipt of this telegram the defendants wrote to the plaintiff's solicitors in these words: "We have now heard from our clients in San Francisco, and the Union and Sun Insurance Companies are prepared to abide by the offer they have made some time ago, although the same was not accepted at the time. Will you please send us

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up the policies? We can then doubtless arrange for an early settlement. Our clients insist that the judgments you have obtained against them must be cancelled in a formal manner." The policies and judgments were forwarded on October 3. On the 7th the defendants' solicitors sent the judgments to the plaintiff's solicitors with releases indorsed for the plaintiff's execution. He executed them and they were returned on the 8th. On the 10th the defendants' solicitors wrote to the plaintiff's solicitor: "We have received the judgments with the releases indorsed thereon and now forward you the policies with the certificates, and on presentation at the bank, the Anglo-Californian Bank in London, you will obtain payment. We should say you will be able to present the policies through your own bankers. The bankers have already had it notified to them that the certificates have been granted." Payment in respect of the Sun policy certificate was refused to the plaintiff by the Anglo-Californian Bank on instructions from the Sun Company cabled from America. Some correspondence between the solicitors of the plaintiff and the defendants took place in November and December, and the mistake under which the defendants had acted was fully explained. It was in no way disputed that the defendants had throughout acted bonâ fide in the matter.

On January 8 the plaintiff's solicitors wrote to the defendants: "Since the Sun Company repudiate your action in settling this matter, Mr. Meek instructs us to apply to you for the amount agreed to be paid to him as the consideration for releasing the judgment against the company." In reply the defendants' solicitors returned the release, which Messrs. Wendt & Co. had never parted with, and pointed out that Mr. Meek could cancel it, and remain with his remedy under his judgment for 1000*l.* The plaintiff's solicitors returned the release, notifying that Mr. Meek held the defendants liable for the sum of 300*l.*, to recover which and certain expenses thrown away this action was brought.

At the trial it was not seriously contested that the defendants had in their letter dated October 1, innocently represented themselves as having the authority of the Sun Company to settle the claim of the plaintiff for 300*l.*, and the question principally discussed was as to the proper measure of damages for the

defendants' false representation of authority. The plaintiff contended that he was entitled to the full sum of 300*l.* and the expenses he had incurred in negotiating the compromise. The defendants paid into Court a sum sufficient to meet such expenses as had been incurred subsequent to October 1, but denied any further liability. The matter therefore to be decided is whether the plaintiff is entitled to any, and what, additional damages.

Now he is entitled to all the damages which are the natural and proximate consequence of the false assertion of authority. "The measure of damages," says Lord Esher, M.R., in *In re National Coffee Palace Co.* (1) "in actions for breach of warranty of authority is always the same in every case. I will not consider what theoretically it ought to be, but I say we must decide it according to the rule which has been followed for a series of years. *Spedding* v. *Nevell* (2) and *Godwin* v. *Francis* (3) are cases in which the plaintiff was the intended purchaser, and *Simons* v. *Patchett* (4) was a case in which the plaintiff was the intended vendor, and in all these cases the Court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have: in other words what the plaintiff would have gained by the contract which the defendant warranted should be made." Applying this rule to the present case the plaintiff by losing the particular contract which was to have been made has primâ facie lost the expenses thrown away, and the sum of 300*l.*, which I have no doubt he would have obtained without delay or difficulty in London from the Anglo-Californian Bank within three days after sight of the approved certificates. But then it is contended by the defendants that the plaintiff is in a position to enforce all his original rights against the company on the judgment and on the policy, and that these are worth at least as much as 300*l.*, so that the plaintiff has in truth lost nothing beyond the expenses thrown away. But with regard to the judgment it was not disputed that the law as to enforcing foreign judgments is the same in the Courts of the United States, as in

(1) 24 Ch. D. 371.
(2) Law Rep. 4 C. P. 212.
(3) Law Rep. 5 C. P. 295.
(4) 7 E. & B. 568.

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our own, and according to our law the judgment could not be effectively put in suit in the Courts of the United States inasmuch as the defendant company were not English subjects or resident in England either when the policy was issued or when the suit was commenced. This seems clear from the case of *Schibsby* v. *Westenholz* (1), per Blackburn, J. (2), and in this country the judgment has no present value, as the defendant company have no property here available for execution. With regard to the claim on the policy no doubt the plaintiff has a claim which he may or may not be able successfully to enforce at San Francisco: a claim, however, which has been wholly repudiated and which will be strenuously resisted. I cannot fix any pecuniary value on this claim, and I do not think that its existence ought to affect the amount which is primâ facie the proper amount to be awarded to the plaintiff for the loss of the particular contract which was to have been made by the alleged principal. I therefore give judgment for the plaintiff with costs for 300*l.* in addition to the money paid into Court.

Solicitors for plaintiff: *Wynne, Holme, & Wynne, for Simpson & North, Liverpool.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

(1) Law Rep. 6 Q. B. 155. (2) At p. 160.

H. D. W.

THE QUEEN *v.* THE REGISTRAR OF JOINT STOCK COMPANIES. 1888 *May* 4.

Mandamus—Alternative Remedy—Registrar of Joint Stock Companies—Refusal to file Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *ss.* 18, 19, 20.

An application was made for a mandamus to compel the Registrar of Joint Stock Companies to file, under s. 25 of the Companies Act, 1867, a contract which he had refused to file on the ground that it was insufficiently stamped:—

Held, that the proper mode of questioning the legality of the registrar's refusal was by obtaining the opinion of the Commissioners of Inland Revenue, and appealing from their decision to the High Court, under ss. 18, 19, and 20 of the Stamp Act, 1870, and therefore, as there was another appropriate remedy, a mandamus must be refused.

A RULE nisi had been granted for a mandamus to compel the Registrar of Joint Stock Companies to file a contract, dated January 27, 1888, under s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131).

The publishing firm of Sampson Low, Marston, Searle, and Rivington arranged to sell their business to a limited company, and to carry out the sale a contract dated January 2, 1888, was prepared, and was presented to the Registrar of Joint Stock Companies to be filed. The registrar refused to file the contract on the ground that it was insufficiently stamped. An application was then made to the Commissioners of Inland Revenue under s. 18 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), for their opinion as to the sufficiency of the stamp. The Commissioners decided that the stamp was insufficient, and the applicants did not appeal from their decision. A second contract was then drawn up dated January 27, to which a schedule was annexed containing the terms of the contract of January 2. The registrar on February 8 refused to file the document of January 27 unless the document of January 2 was produced to him properly stamped. (1)

(1) By the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares."

By s. 18 of the Stamp Act, 1870 (33 & 34 Vict. c. 97), the Commissioners of Inland Revenue may be re-

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The rule nisi was moved for and granted on March 8.

R. S. Wright (*Sir Richard Webster, A.G.*, with him), shewed cause. The Registrar of Joint Stock Companies is an officer to whom mandamus does not lie. Questions as to the liability of officials in similar positions have from time to time arisen, as in *Reg.* v. *Registrar of Friendly Societies* (1), *Dixon* v. *Farrer* (2), and other cases, but this point has never been argued or decided. The registrar is an officer of the Board of Trade, which is a department of the Government, being the Committee of the Privy Council for Foreign Trade and Plantations. The Board of Trade is defined in the Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), ss. 2, 65. The position of the registrar and the question as to his liability depend on s. 174 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which shews that he is an officer who is to exercise a discretion, in which case it is clear that mandamus does not lie.

[WILLS, J. Sect. 17 of the Companies Act, 1862 (25 & 26 Vict. c. 89), provides for delivery of the memorandum and articles of association to the registrar, "who shall retain and register the same." Surely mandamus would lie if the registrar refused.]

No mandamus ought to be granted if a penalty would or might be incurred as the consequence of obedience: *Rex* v. *Justices of Buckinghamshire* (3); *Rex* v. *Broderip.* (4) The registrar might be rendered liable to a penalty under s. 22 of the Stamp Act, 1870 (33 & 34 Vict. c. 97).

Here there is an alternative remedy, which is an answer to the application for a mandamus. The proper course would have been to obtain the opinion of the Commissioners of Inland Revenue as to the sufficiency of the stamp on the deed of January 27, and, if their opinion were adverse, to appeal by special case in accordance with ss. 18, 19, and 20 of the Stamp Act, 1870.

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quired to express their opinion as to the duty chargeable on any executed instrument.

Sect. 19 gives an appeal to the High Court from the decision of the commissioners by case stated.

Sect. 20 empowers the commissioners to call for such evidence as they may deem necessary.

(1) Law Rep. 7 Q. B. 741.

(2) 17 Q. B. D. 658; affirmed 18 Q. B. D. 43.

(3) 1 B. & C. 485.

(4) 5 B. & C. 239.

Sir Henry James, Q.C., and *Macaskie*, in support of the rule. A duty is imposed on the registrar by statute, and therefore mandamus lies: *Reg.* v. *Lords of the Treasury* (*Queen Dowager's Annuity*). (1)

[WILLS, J., referred to *Reg.* v. *Lords Commissioners of the Treasury*. (2)]

The argument on the other side amounts to a claim to the right to disregard the positive directions of a statute.

As to the question of alternative remedy the rule is stated by Hill, J., as follows: "It is well settled that where there is a remedy equally convenient, beneficial, and effectual, a mandamus will not be granted": *In re Barlow*. (3) This is as favourable a statement for the other side as can be found, but it does not cover this case, for here the alternative remedy would not be equally convenient, for the opinion of the Commissioners of Inland Revenue is already known, and therefore it is certain that it would be necessary to await the result of an appeal, and until the contract has been filed the purchase cannot be completed: Companies Act, 1867 (30 & 31 Vict. c. 131), s. 25.

FIELD, J. I am of opinion that the rule ought to be discharged.

I give no opinion as to whether the Registrar of Joint Stock Companies is an officer to whom a mandamus can issue, because I have come to the conclusion, on another ground, that no mandamus ought to issue in this case.

The facts are these. The company who make the present application wanted to have a contract filed under s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131). The first document which the company thought ought to be filed was executed on January 2, 1888, and was tendered to the registrar, who objected that it was not properly stamped, on the ground that it required an ad valorem stamp. The registrar has an onerous duty to perform, and if he files an instrument which is not duly stamped he is liable to a penalty by s. 22 of the Stamp Act, 1870 (33 & 34 Vict. c. 97). The company then adopted the

(1) 16 Q. B. 357. (2) Law Rep. 7 Q. B. 387.
(3) 30 L. J. (Q. B.) 271.

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remedy given by s. 18 of the Stamp Act, 1870, and asked the opinion of the Commissioners of Inland Revenue as to whether any and what duty was payable beyond that which had already been paid. The case was gone into before Mr. Melville, the Solicitor of Inland Revenue, and his opinion, to the effect that an ad valorem duty was payable, was given on January 18. The company could have appealed from this decision, and this would have been the most convenient and effectual remedy, because by s. 19 of the Stamp Act, 1870, the Court before which the appeal would have come would have had power to find out the proper amount of the stamp, and to assess the duty with which the document was chargeable, and the case would have been framed under s. 20, by which the Commissioners have power to call for and require evidence, and they would have taken care that all the facts were fully brought before the Court, whereas if we were to enter upon the question on this rule for a mandamus, we should have to decide on conflicting affidavits. Instead of appealing, however, the company drew up a fresh deed, which is certainly a most remarkable document, for instead of containing the terms of the contract in the body of the deed, it refers to a schedule in which the old deed is copied. The company then apply to the registrar to file the new deed, but he objects, and requires to be shewn the deed of January 2, in order that he may ascertain whether it is properly stamped, for if the two deeds are the contract, and the first deed is not properly stamped, the stamp duty is insufficient. Not being shewn the first deed, the registrar on February 8 refused to file the second deed. The company could then have applied to the Commissioners in respect of the second deed, but instead of doing so they waited until March 8, and then moved for this rule for a mandamus, which now, in May, comes on for argument. The delay which has taken place is therefore entirely attributable to the course adopted by the applicants themselves.

It is clear that the granting or refusing an application for a mandamus is in the discretion of the Court. The principle on which the Court proceeds is defined by Lord Campbell, C.J., in *Reg.* v. *Lords of the Treasury* (*Queen Dowager's Annuity*) (1), and

(1) 16 Q. B. 357.

also by Hill, J., in the passage which has been cited in argument from *In re Barlow*. (1) The question, therefore, which we have to decide is, whether the applicants in the present case have another remedy besides mandamus, which is equally convenient, beneficial, and effectual. The remedy by mandamus even in modern times is inconvenient, and it is a remedy which owing to the cumbrous nature of the procedure one would not feel inclined to choose if there were another remedy equally available. The question here is, whether there is any other efficient remedy. It is agreed on both sides that the question intended to be raised is whether the contract is properly stamped. If there were no appeal from the decision of the Commissioners on that point I should say that the process under the Stamp Act would be a less beneficial remedy, but the Act expressly gives an appeal. The remedy is given for the benefit of everybody, and we know as a matter of practice that in such a case the Attorney General would be entitled to ask to have a day fixed for the hearing of the appeal, on the ground that it raised a question affecting Her Majesty's revenue. On the present application we should have to decide the question on affidavits, and I am not sure that we could decide whether the stamp was right.

A mandamus ought not to be granted where another remedy is provided, which is not less convenient, beneficial, and effectual, and in the present case the existence of such a remedy by proceedings under the Stamp Act ousts the right to a mandamus.

WILLS, J. I am of the same opinion. I cannot bring myself to entertain any doubt that a mandamus would lie to the registrar. The case is covered by the language of Blackburn, J., in *Reg.* v. *Lords Commissioners of the Treasury* (2), where he said, "The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by mandamus, namely, to issue a minute to pay that money: because it seems to me clear that we ought to grant a mandamus if there is such a statutory obligation."

(1) 30 L. J. (Q. B.) 271.

(2) Law Rep. 7 Q. B. at p. 397.

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In the present case it is clear that the registrar has no discretion, but is acting in the performance of a ministerial office.

But it is a well established rule of practice, as to which there can be no doubt, that a mandamus ought not to be granted where there is another appropriate remedy. I do not wish to put it so high as to say that the other remedy must be as convenient, for I think that if no reasonable objection can be taken to the alternative remedy a mandamus ought not to be granted. It would be unfortunate if a rule of practice which has prevailed for a great number of years were lightly cast aside.

Now, in the present case, I am of opinion that the remedy given by the Stamp Act is appropriate, convenient, and effectual. The delay which has occurred is the fault of the applicants themselves, for if they had taken the proper steps by applying to the Commissioners of Inland Revenue for their opinion immediately after the registrar's refusal on February 8, and then appealing from the Commissioners' decision, in the present state of the list the case would have been heard long ago. I think it is not correct to say that the balance of convenience at the present time is what has to be considered. The comparison of the two remedies should be made at the natural time for resorting to one or other of them.

Rule discharged.

Solicitors for prosecutors: *Taylor, Hoare, Taylor, & Box.*
Solicitor for defendant: *The Solicitor to the Board of Trade.*

P. B. H.

IN RE HALL AND OTHERS.

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May 11.

Patent—Action for Injunction against Threats of Legal Proceedings—Cross-Action for Infringement—Application by Patentee in Cross-Action for Leave to apply to amend Specification by way of Disclaimer—"Pending Legal Proceeding"—Prohibition—Patents, Designs and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 32.

By s. 18, sub-s. 1, of the Patents, Designs and Trade Marks Act, 1883, "a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification . . . by way of disclaimer, correction or explanation. . . ."

By s. 18, sub-s. 10: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending."

By s. 19: "In an action for infringement of a patent and in a proceeding for revocation of a patent the Court or a judge may order that a patentee shall . . . be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer. . . ."

An action having been commenced under s. 32 of the Patents, Designs and Trade Marks Act, 1883, for an injunction to restrain patentees from issuing threats of legal proceedings and for damages, the patentees brought a cross-action for infringement of their patent. The patentees then applied in the cross-action and obtained a judge's order under s. 19 giving them liberty to apply to the Comptroller General of Patents for leave to amend their specification by way of disclaimer. Upon an application for a writ of prohibition to the Comptroller General to prevent him from hearing the application upon the order:—

Held, that the judge had jurisdiction to make the order, notwithstanding that the action under s. 32 had not been concluded, and that the application for a prohibition must be refused.

APPEAL from a decision of Denman, J., at chambers refusing to grant a writ of prohibition to the Comptroller General of Patents to restrain him from hearing an application for the amendment of a specification by way of disclaimer.

The Haslam Foundry and Engineering Company, Limited, who were the owners of a patent for the construction of refrigerating machines, brought an action against Hall & Co. for an infringement of their patent. At the trial before Stephen, J., without a jury, the learned judge found that the third claim in the specification was a valid claim, and had been infringed by the defendants, but he further found that the second claim in the

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specification was bad, and upon December 3, 1887, gave judgment upon the whole action for the defendants.

Pending this action, an action had been commenced on March 22, 1887, by Messrs. Goodfellow & Matthews against the Haslam Foundry and Engineering Company under s. 32 of the Patents, Designs and Trade Marks Act, 1883 (1), to recover damages for threats of legal proceedings in respect of the same patent, and to obtain an injunction against the continuance of the threats.

On March 28, 1887, the Haslam Foundry and Engineering Company brought a cross action for infringement of their patent against Goodfellow & Matthews, obtaining thereby the benefit of the proviso in s. 32 of the Act.

On April 5, 1887, a motion was made in the action brought by Goodfellow & Matthews for an interim injunction against the Haslam Foundry Company to prevent the continuance of the threats, which was consented to for a limited time, and proceedings in that action were stayed until further order.

On December 2, 1887, an application was made under s. 19 (2)

(1) By s. 32 of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57): "Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

(2) By s. 18, sub-s. 1, of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57): "An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same."

Sub-ss. 2 to 9 deal with the procedure upon such an application.

By sub-s. 10: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending."

By s. 19: "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such

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of the Act on behalf of the plaintiffs in the action brought by the Haslam Company against Goodfellow and Matthews for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer, and an order was made by Kay, J., giving the Haslam Foundry Company leave to make the application, which order was not appealed against. No such application for leave was made in the action for threats brought by Goodfellow & Matthews against the Haslam Foundry Company, that not being an action for infringement of a patent or a proceeding for revocation of a patent. An application was then made at chambers on behalf of Messrs. Hall & Co., Messrs. Goodfellow & Matthews, and others, for a writ of prohibition to prohibit the Comptroller General of Patents from acting on the order of Kay, J., and hearing the application for leave to amend the specification, but Denman, J., refused to grant a writ.

The applicants appealed.

Moulton, Q.C., and *W. R. Bousfield*, for the appellants. An action under s. 32 for threats is a legal proceeding in relation to a patent within the meaning of sub-s. 10 of s. 18. The expression "other legal proceeding" in that sub-section must have a wider meaning than that given to it in *Cropper* v. *Smith* (1) by Chitty, J., who regarded it as referring to a proceeding for revocation, treating s. 19 as correlative with s. 18, sub-s. 10. The action under s. 32 was therefore a pending legal proceeding in relation to this patent within the meaning of sub-s. 10, and during the pendency of that action Kay, J., had no jurisdiction to make the order under s. 19 giving leave to make the application to the Comptroller General. Each legal proceeding in relation to the patent is a distinct bar to the jurisdiction of the Comptroller General, and as no leave to apply to him could be given in the threat action under s. 32, it not being an action for infringement or a proceeding for revocation, the existence of that action operated as a complete bar to the right of the Haslam Foundry

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terms as to costs or otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

(1) 28 Ch. D. 148.

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Company to obtain the leave they required. Their proper course was to submit to judgment in the action under s. 32, when they could have made the application in their own action for infringement against Goodfellow & Matthews, and have obtained the order.

[They also cited *Kurtz* v. *Spence* (1); *Fusee Vesta Co.* v. *Bryant.* (2)]

Sir R. E. Webster, A.G., Aston, Q.C., and *Carpmael,* for the respondents, were not called upon.

Ingle Joyce, for the Comptroller General.

CAVE, J. I am of opinion that the order of my brother Denman was right, and that this appeal must be dismissed. The case turns upon the construction of ss. 18 and 19 of the Act of 1883. Under the old law patentees were frequently defeated by mere technicalities, and however ingenious the patented invention might be, if there was a technical flaw in the specification the patentee lost all the benefit of his patent and was cast in an action in which upon the merits he ought to have succeeded. An attempt to prevent this injustice is made in s. 18 of the recent Act. By this section power is given to the patentee to make an application to the Comptroller General of Patents for liberty to amend his specification by way of disclaimer, correction or explanation, and the various sub-sections regulate the course of proceeding upon such applications, the last sub-section providing that the provisions of the section are not to apply so long as any action for infringement or other legal proceeding in relation to a patent is pending. The consequence of this proviso is that whenever there is a legal proceeding pending in relation to a patent the patentee cannot go as a matter of course to the Patent Office and apply for leave to disclaim, and if the matter stood there the Comptroller General would be wrong in entertaining an application which the patentee would have no power to make. But then comes s. 19, which gives power to the Court or a judge in an action for infringement of a patent or in a proceeding for revocation to make an order allowing the patentee to apply for leave to amend his specification by way of disclaimer. Now in the present case

(1) 33 Ch. D. 579; 36 Ch. D. 770. (2) 4 Pat. Cas. 71, 191.

there was an action brought for the infringement of the patent, and Kay, J., made an order in the action under this section giving the patentee leave to make an application at the Patent Office for leave to amend. Nothing is said in the Act as to the course of proceedings upon the application to the Comptroller General for an amendment; but it is clear, notwithstanding the awkward language of sub-s. 10 of s. 18, that the procedure under s. 18 is meant to apply to cases where leave to make the application is given by the judge under s. 19. Nothing is said in the section as to there being more than one legal proceeding pending, and the grammatical language of the section is satisfied by holding that the order of Kay, J., was properly made under that section.

But it is said that, although this is the ordinary grammatical meaning, the consequences of so reading the section would work such injustice that it ought to be read differently. I am not convinced by these arguments. In the first place I am not satisfied that the object of requiring the leave to be given is the benefit only of the persons who are engaged in the actions. It may well be that the intention of the legislature was that the judge should see for himself what sort of an amendment it was for which leave to apply was asked, and what kind of disclaimer it was intended to ask for, so that he should not allow the application to be made in cases where the allowance of the disclaimer would make a serious alteration in the nature of the patent. But where it is clear to the judge that the amendment required does not effect any substantial alteration, but is only necessary in order to enable the patentee to meet a technical objection set up by the defendant, in such a case I think the legislature intended to give the judge power to say that he would not allow such an objection to prevail. It must be remembered too that after leave to make the application has been given by the judge, all persons interested may be heard before the Comptroller, who has a discretion as to allowing the amendment, and as to the conditions upon which it should be granted.

I am unable to see in what way our interpretation of the language of the section can work injustice. A very strong case of injustice arising from giving the language of an Act of Parlia-

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ment its natural meaning must be made out before the Court will construe a section in a way contrary to the natural meaning of the language used; and it will be no injustice if the result of our decision be to deprive the person who infringes a patent of the right to set up a defence which does not go to the merits. As the respondents bring themselves within the clear language of the statute, there is no ground for prohibiting the Comptroller General from proceeding with the hearing of the application.

A. L. SMITH, J. This was an application to my brother Denman to prohibit the respondents from obeying an order made by Kay, J., and it is one of the most novel applications that I ever heard. The facts are very simple. The action of Goodfellow and Matthews against the Haslam Foundry Company for having used threats was commenced on March 22, 1887; it was brought under s. 32 of the Patent Act, 1883, and the Haslam Foundry Company at once brought a cross action for infringement against Goodfellow and Matthews in order to obtain the benefit of the proviso in that section; so matters stood on March 28. In April there was an application by Messrs. Goodfellow and Matthews against the Haslam Company for an injunction to prevent the continuance of the threats, and an injunction was by arrangement granted for a limited period, all proceedings standing over until further order. Pending this the Haslam Company were in litigation with Messrs. Hall and their action was tried before my brother Stephen with the result that one claim in the specification was found to be bad, and the patent was invalidated. No application for leave to disclaim was made in that action before judgment, but an application under s. 19 was made to Kay, J., in the action brought against Goodfellow and Matthews, and leave to apply to the Comptroller General was granted. This order of my brother Kay was never appealed against, yet now it is said that it was all wrong, and that the Comptroller General ought not to obey it. The point is taken that that order is wrong, and that there was no power to make it at all, and it is said that this result is brought about by reading ss. 18 and 19 of the Act together. Now I do not say what is the meaning of the expression "legal proceeding" in sub-s. 10 of s. 18, or whether it is, as my

brother Chitty said in *Cropper* v. *Smith* (1), equivalent to an action for infringement or proceeding for revocation and no more; that seems to me to be immaterial. Nor do I decide whether an action for threats is a "legal proceeding in relation to a patent," nor whether the cross action of the Haslam Foundry Company was commenced and prosecuted with due diligence; for I cannot entertain a doubt as to the true construction of ss. 18 and 19, upon which this point is taken. The former section gives power to a patentee who discovers a blunder in his specification to go proprio motu to the Comptroller for leave to amend his specification by way of disclaimer, correction, or explanation, and a whole series of sub-sections regulate the procedure upon such an application; the last of these sub-sections seems to me a most natural one, and means that a patentee who is actually engaged in litigation as to the validity of an existing patent shall not go behind the back of the other party and get amendments made and set himself right. Now if there were no s. 19, a patentee with a technical flaw in his specification would be defeated the moment a writ was issued, no matter how small and technical might be the blunder in his specification. I read that section as a proviso on the preceding one, and as allowing a patentee under such circumstances to go to the Comptroller General to amend his specification by way of disclaimer, if leave be given him by the Court or a judge. This is precisely the effect of the order of Kay, J.; but it is said that his order is of no avail, because there is the threat action pending. I am quite unable to adopt this argument, and I think that my brother Kay had jurisdiction to make the order, and that the Comptroller General would be wrong if he were to decline to obey it.

Appeal dismissed.

Solicitors for appellants: *J. H. & J. Y. Johnson.*

Solicitors for respondents: *Wilson, Bristows, & Carpmael.*

Solicitor for Comptroller General of Patents: *Solicitor to Board of Trade.*

(1) 28 Ch. D. 148.

W. J. B.

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April 13, 14;
June 4.

BLACKBURN, LOW & CO. *v.* HASLAM.

Insurance (Marine)—Concealment of Material Facts—Principal and Agents.

The plaintiffs, underwriters in Glasgow, employed there a firm of insurance brokers to reinsure a ship which was overdue. The brokers received information tending to shew that the ship, as was the fact, was lost. Without communicating this information to the plaintiffs, they telegraphed in the plaintiffs' name to their own London agents, stating the rate of insurance premium which the plaintiffs were prepared to pay. Communications followed between the plaintiffs and the London agents, and the London agents, through a firm of London insurance brokers, effected a policy of re-insurance at a higher rate of premium, which policy was underwritten by the defendant:—

Held, that the policy was void on the ground of concealment of material facts by the agents of the assured.

Blackburn, Low & Co. v. *Vigors* (17 Q. B. D. 553; 12 App. Cas. 531) considered.

APPLICATION on behalf of the plaintiffs to set aside the verdict and judgment for the defendant and to enter judgment for the plaintiffs, or for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence.

The following statement of the facts is taken from the judgment of the Court:—

This was an action upon a policy on the hull and machinery of the ship *State of Florida*, underwritten by the defendants for 800*l*. At the trial, which took place before Day, J., and a special jury of London, it was proved that Messrs. Blackburn, Low & Co., who were underwriters and insurance brokers at Glasgow, insured the steamer *State of Florida* for 1500*l*. from New York to Glasgow. She left New York on April 11, 1884, and was due at Glasgow about April 25. Upon May 1, Messrs. Blackburn, Low & Co., being desirous of covering their liability, instructed Messrs. Rose, Murison, & Thomson, another firm of insurance brokers at Glasgow, to effect a reinsurance upon the *State of Florida* for 1500*l*.

Acting upon these instructions, Messrs. Rose, Murison, & Thomson, at 11.29 A.M. telegraphed to their agents, Messrs. Rose, Thomson, Young & Co., who were insurance brokers in London, as follows: "Blackburn Low wish to reduce *Florida* lines, cover for them 1500*l*. at 15 guineas net." In reply to this they received at 1 P.M., a telegram sent at 12.35. P.M. by Messrs. Rose,

Thomson, Young & Co.: "*State Florida*—20 guineas paying freely and market very stiff, likely to advance before day is out."

Up to midday nothing was known either by Blackburn, Low & Co., or Rose, Murison, & Thomson, of the *State of Florida*, except that she was overdue. About 12.30, Mr. Murison, a partner in the firm of Rose, Murison, & Thomson, had an interview with the manager of the State Line Company, who owned the *State of Florida*, and he informed Mr. Murison in confidence that his directors in London had received intelligence that the *City of Rome* steamer, on her way to Liverpool, had seen a vessel having on board some of the shipwrecked crew of the *State of Florida*.

Upon receiving the telegram at 1 P.M., Messrs. Rose, Murison, & Thomson communicated its contents to Messrs. Blackburn, Low & Co., who said they might pay 20 guineas. Mr. Murison considered that as he had received the intelligence about the shipwrecked crew in confidence he was not entitled to communicate it to Messrs. Blackburn, Low, & Co.; but afterwards, at 1.19, he telegraphed in Blackburn, Low, & Co.'s name to Rose, Thomson, Young & Co.: "*Florida*—Pay twenty guineas." In reply to this, the latter firm, at 2.14, telegraphed direct to Blackburn, Low & Co.: "*State Florida*—Market now worked out at twenty guineas, no chance under twenty-five guineas, and for to-day only." This was received by Blackburn, Low & Co. at 2.29, and at 3.2 they replied: "*State Florida*—If you cannot do better, pay twenty-five guineas and wire instanter." To this Messrs. Rose, Thomson, Young & Co., replied at 4.37, "*State Florida*—Done 800*l.* at 25 guineas, no chance more to-day under thirty guineas." As the negotiations for this insurance were not completed by Messrs. Rose, Murison, & Thomson, they did not charge any commission to the plaintiffs. After the receipt of the last telegram, Messrs. Rose, Thomson, Young & Co., communicated with another London broker, who effected the insurance in question with the defendants; and they, upon becoming acquainted with the above facts, declined to pay.

At the conclusion of the case, Day, J., after calling the attention of the jury to the material facts, directed them as follows:

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"Now, the question I leave to you is, first of all, Were Rose, Murison, & Thomson employed to effect an insurance? I do not mean whether their authority was limited to the insurance of fifteen guineas, the first telegram, because they were afterwards authorized, as we know, to go to twenty guineas, but were they generally authorized to act on behalf of the plaintiff? The next question is: Was this insurance effected through their agency? I think it will make it abundantly clear if I substitute for "their" the word "that," and relieve it of all possible ambiguity. Was this particular insurance effected through "that" agency? Who introduced the London firm? Rose, Thomson, Young, & Co., it is true, are the people who go and see the underwriters in London, it may be still acting as the correspondents or agents of Rose, Murison, & Thomson, of Glasgow. Was it effected through that agency? Did Rose, Murison, & Thomson of Glasgow, put the matter in the hands of Rose, Thomson, Young, & Co. of London for the purpose of carrying out the insurance effected by their agency? Was it all one negotiation, or was it really taken out of the hands of Rose, Murison, & Thomson, of Glagow and put into the hands of the plaintiffs irrespective of Rose, Murison, & Thomson, of Glasgow? Was it taken out of their hands, and, as it were, a new negotiation commenced, or was the policy effected in pursuance of the original agency? Was it all one transaction or not? That is what I substantially mean by the question I put to you. In the second place, was the insurance effected through "that" agency? The jury found a verdict in the affirmative as to both questions, and the learned judge thereupon directed that a verdict and judgment should be entered for the defendant with costs.

Sir C. Russell, Q.C., *Cohen, Q.C.*, and *Hollams*, for the plaintiffs. The plaintiffs are entitled to judgment. The case cannot in principle be distinguished from *Blackburn, Low & Co.* v. *Vigors*. (1) The distinction in the facts on which the defendant relies is that, whereas in *Blackburn, Low, & Co.* v. *Vigors* (1) the firm of Rose, Murison, & Thomson of Glasgow, a member of which possessed the concealed information, did *not* place the

(1) 17 Q. B. D 553; 12 App. Cas. 531.

plaintiffs in communication with Roxburgh, Currie & Co., through whom the insurance was in that case effected, here Rose, Murison, & Thomson, of Glasgow, *did*, by a telegram sent in the name of the plaintiffs themselves, bring the plaintiffs into communication with Rose, Thomson, Young & Co. of London, through whom the insurance was in this case effected. This circumstance is of no importance. The evidence shewed that Rose, Murison, & Thomson of Glasgow, and Rose, Thomson, Young & Co. of London, were independent firms, and that neither the plaintiffs nor Rose, Thomson, Young & Co. had any knowledge of the concealed facts. Lord Esher, M.R., in reviewing the facts out of which both cases arose, said that the authority of Rose, Murison, & Thomson of Glasgow "lasted until the plaintiffs were put into direct communication with Rose, Thomson, Young & Co." of London, "when it of course ceased." (1) The telegram which brought about this communication, and which was the last act of the Glasgow firm in the transaction, conveyed to the London firm the plaintiffs' authority to insure at twenty guineas premium. This authority was never acted upon. The plaintiffs then, without any intervention of the Glasgow firm, gave the London firm a different authority, namely one to insure at twenty-five guineas premium. It is under this authority only that the present policy was effected, and the Court cannot look beyond the information possessed by the plaintiffs and the London firm, the plaintiffs' agents, to effect the policy. The preceding employment of the Glasgow firm is immaterial. There never was any means of communication between the Glasgow firm and the defendant. An insurance agent cannot conceal facts from an underwriter whom he does not know.

The case is the same as if the London firm in reply to the telegram sent by the Glasgow firm in the plaintiffs' name, had telegraphed that they were unable to effect the reinsurance in London, and the plaintiffs had then gone up to London and set about the reinsurance on their own account. If a merchant to-day employs an agent to bid 5*l.* for goods in some market, is he precluded from bidding 10*l.* for them in person in the same market

(1) 17 Q. B. D. 555.

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to-morrow, because the agent has in the meantime received information, such as that the goods have been stolen, which would avoid the contract of sale if effected through him?

The person who possessed the concealed information was under no legal obligation to communicate it to the plaintiffs, and Lord Macnaghten in *Blackburn, Low & Co.* v. *Vigors* (1) points out the danger of extending the doctrine of constructive notice so as to affect the plaintiffs in such circumstances with knowledge of the concealed information.

Sir R. E. Webster, A.G., and *Barnes, Q.C.*, for the defendant. The material difference between the present case and *Blackburn, Low & Co.* v. *Vigors* (1) is that here the insurance was effected through Rose, Murison, & Thomson, the Glasgow firm which possessed the concealed information, while in *Blackburn, Low & Co.* v. *Vigors* (1) it was effected through Roxburgh, Currie & Co., another firm, and without the intervention of Rose, Murison, & Thomson. This difference was insisted on in the arguments for the plaintiffs in *Blackburn, Low & Co.* v. *Vigors.* (1) Here the insurance was effected through Rose, Murison, & Thomson. As the risk was intended by their principals to be covered in London, and they were in Glasgow, Rose, Murison, & Thomson employed as sub-agents Rose, Thomson, Young, & Co. of London, and Rose, Thomson, Young & Co., of London, in their turn employed the insurance broker in London who effected the policy. In other words, Rose, Murison, & Thomson, as agents for the plaintiffs, obtained the insurance through a chain of sub-agents. The telegram in the plaintiffs' name was a mere stratagem of Rose, Murison, & Thomson, in order to save the policy about to be obtained from being void at law, and the negotiation which followed only continued the original negotiation. The alteration in the rate of premium to be offered did not constitute a fresh mandate. Apart from this alteration there could be no pretence for treating the whole negotiation which led to the policy sued upon as being anything but one transaction.

Sir C. Russell, Q.C., in reply.

Cur. adv. vult.

(1) 12 App. Cas. 543.

The judgment of the Court (Pollock, B., and Charles, J.) was delivered by

POLLOCK, B. [The learned judge stated the facts as above, and proceeded :—] The jury found a verdict in the affirmative as to both questions, and the learned judge thereupon directed that a verdict and judgment should be entered for the defendant with costs. The plaintiffs moved that this verdict and judgment should be set aside, and that judgment might be entered for the plaintiffs or a new trial had, on the ground that the verdict was against the weight of evidence, and that the learned judge at the trial ought to have directed the jury that Rose, Murison, & Thomson were not the agents of the plaintiffs to effect the insurance in question, and that the non-communication of material information within the knowledge of Rose, Murison, & Thomson, but not known to the plaintiffs or their brokers, was not a concealment which would affect the policy, and ought to have directed judgment to be entered for the plaintiffs upon the facts proved or admitted at the trial.

These questions are so closely connected, that the better mode of dealing with them will be to consider whether, taken as a whole, the true conclusions of law and fact have been arrived at. For this purpose it will be convenient to follow the events in order of time.

Starting with the telegram of May 1, 11·29 A.M., there can be no doubt that when that was sent, Messrs. Rose, Murison & Thomson were agents for Messrs. Blackburn, Low & Co., to effect the insurance proposed thereby, and that any knowledge by them of facts material to the risk would be equivalent to a knowledge by their principals, and would vitiate any insurance based upon such proposal. Up to this time, however, both principals and agents were ignorant of any such facts. Before any further step was taken Rose, Murison, & Thomson became aware of the reports brought by the *City of Rome*. They thereupon determined to go no further with the matter in their own names, but, having received the intelligence in confidence, they did not communicate it to Messrs. Blackburn, Low & Co. What they did was this. Having previously obtained the authority of Blackburn, Low & Co. to go as far as twenty guineas, they

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telegraphed in Blackburn, Low & Co.'s own name to the London brokers, Messrs. Rose, Thomson, Young, & Co., who answered direct to Blackburn, Low & Co. that there was no chance under twenty-five guineas; upon which Blackburn, Low & Co. telegraphed back to Rose, Thomson, Young & Co. "pay twenty-five guineas," and upon this the policy in question was effected by the London brokers, Rose, Thomson, Young, & Co., through the agency of another firm of brokers.

Under these circumstances it is clear that up to the time when Messrs. Rose, Murison & Thomson received the last telegram addressed to themselves, they were the agents for the plaintiffs to effect not merely *a* re-insurance but *the* particular re-insurance which the plaintiffs had ordered, viz., upon the ship *State of Florida* for 1500*l.*, and that any knowledge possessed by them which was material to the risk would be equivalent to a knowledge by the plaintiffs themselves. It seems to be equally clear that the agents being incapacitated from continuing the negotiation in the sense that no valid policy could be founded upon it, they could not put themselves in a better position by telegraphing in the name of their principals instead of their own name. They having so telegraphed, and the answer having been sent to the principals, what is the position of the latter?

That they might have effected a valid policy by a fresh and independent negotiation carried on through another agent is established by the decision of the House of Lords in *Blackburn, Low & Co.* v. *Vigors* (1), and for the purpose of this case it may be further conceded that the principals might themselves have opened a new and independent negotiation with the brokers in London by giving a fresh order for the policy. This, however, was not done. Messrs. Blackburn, Low & Co. merely telegraphed to Rose, Thompson, Young & Co.: "*State Florida*—If you cannot do better, pay twenty-five guineas," and upon the basis of this telegram the negotiation continues. The offer is put forward at the increased premium; this is accepted, and the policy in question is signed.

Upon this state of facts the question arises, Was the original negotiation given up and a new and distinct negotiation entered

(1) 12 App. Cas. 531.

upon, or was it a mere handing over by the agents to their principals of an existing negotiation, in order that the principals might take it up at the point where the agents left off, and continue it until it resulted in a contract? This is practically the question which was left by Day, J., to the jury, and they have found that the latter is the true view of what occurred.

In considering their finding it is important to remember that the only instructions as to the name of the ship and the amount to be insured were those contained in the first telegram from the Glasgow agents to the London agents. Without these no proposal could have been forwarded. They were never mentioned again by the plaintiffs, and the effect is the same as if each telegram had reiterated all that had gone before. This also affords an answer to one of the arguments pressed on behalf of the plaintiffs. A merchant, it was said, who sends his agent into the market on Monday with a limited authority as to price, is not prohibited from going into the same market on Tuesday and bidding higher by reason of his agent having some information, such as that the goods were stolen, which would prevent any bargain which he might make resulting in a valid contract. But the reason of this is that the principal in the supposed case only employed the agent pro hâc vice on the Monday, and when he himself went into the market on Tuesday he commenced independent operations in no way based upon the earlier exertions of his agent. In the present case the name of the vessel, the amount to be insured, and the whole object of the bargaining were the same, and the only change was in the advanced premium, so that the plaintiffs not merely continued a negotiation begun by their agents, but they availed themselves of it by using and adopting what they had done up to a certain point. It is truly said, no doubt, that when once the agents ceased to negotiate their authority was at an end, but this leaves untouched the position that the negotiation was handed over to the principals to complete, and that the London brokers were entitled to treat the matter as one entire transaction.

It was also urged that the negotiation was not vitiated by the fact that the principals made use of the information as to the name of the ship and the amount of the policy, as this was done

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merely by way of reference. Had there been no question of agency this would be true. If all that the plaintiffs had done had been to telegraph to the London agents "effect for me the same insurance that you have effected for A. B.," with whom the plaintiffs had had no dealings, the reference to A. B. would not vitiate the ultimate policy because A. B. had improperly withheld information which he ought to have communicated. The distinction, however, between this and adopting the previous acts of an agent and carrying out a contract in part based upon them is obvious.

Whilst considering this part of the case with reference to the principles upon which the law of concealment is founded, it is a legitimate consideration to look to what would be the probable effect of what passed upon the minds of the London agents as business men. Until they received the telegram in the plaintiffs' name they must have supposed that they were dealing with Rose, Murison & Thomson, and in considering whether they would accept the offer they would be entitled to assume that Rose, Murison, & Thomson, whose known means of information might be a material ingredient, had received no news of the ship which they ought to have communicated. As was said by Lord Watson in *Blackburn, Low & Co.* v. *Vigors* (1), "when an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not." When the matter was taken up by the plaintiffs themselves, and the further negotiations were carried on in their own names, the right of the London agents founded upon the negotiation as a whole, to act upon the assumption referred to, to which I have alluded, does not seem to have been displaced.

Another argument much urged by the plaintiffs' counsel was rested upon the assertion that all that passed before the first telegram by the plaintiff amounted merely to offers and negotiation, and that in considering the rights of the defendant the only question which should have been submitted to the jury was what ought the London brokers to have communicated to the defendant or to the intermediate broker by whom the policy

(1) 12 App. Cas. 541.

was ultimately procured. The answer to this is, that if the negotiation by the plaintiffs and the Glasgow brokers was one and the same, as the jury have found it to be, the argument fails, because in almost all cases where a policy has been held to be avoided by reasons of concealment, the concealment occurs some time before the actual policy is signed. It is the negotiation that is tainted, and the contract is void because it is founded upon the negotiation, and through however many hands the offer of an insurance may pass, if there be a concealment by the assured or his agent, the policy is avoided.

If the view which we have taken of the facts and of the law which arises out of them be the true view, this judgment in no way conflicts with the decision in *Blackburn, Low, & Co.* v. *Vigors.* (1) Although the opinion was expressed in that case that it was not the duty of the agents to communicate to their principals the information which they had received, we take that opinion as applying to the particular facts before the House, which shewed that, before the negotiation for the policy sued upon had commenced, all connection of the plaintiff with his former brokers had ceased, and we cannot suppose it would be intended to apply to the facts proved in the present case, which shewed that so far from the connection between the principals and their agents ceasing, the brokers used the name of the principals to continue the negotiations, and the principals adopted the act and themselves continued and carried out what their brokers had commenced.

It is not for us to enter upon the question whether Messrs. Rose, Murison & Thomson acted contrary to the rules of morality in failing to communicate to Messrs. Blackburn, Low & Co. the information which they had received. Whatever may have been their moral duty, the fact that the information was given in confidence could not affect or lessen the legal rights of the defendant, and could not justify Messrs. Rose, Murison, & Thomson in continuing the negotiation in the plaintiffs' name and enabling the plaintiffs themselves to continue it in innocence of that information. To hold otherwise would be to afford a great temptation to all brokers who may be placed in the same

(1) 12 App. Cas. 531.

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or a similar position, and would cut down to an important extent the rule as to good faith which has hitherto been applied by our Courts and by commercial usage to the contract of insurance.

We think that the summing-up and verdict were correct. Therefore the verdict and judgment for the defendants must stand, and the motion must be dismissed with costs.

Motion dismissed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendant: *Waltons, Bubb, & Johnson.*

H. D. W.

June 5.

[IN THE COURT OF APPEAL.]

WHITELEY *v.* BARLEY.

Local Government Acts—Officer of Local Authority—Contract with Local Authority—Allowance in addition to Salary—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 189, 193, 326.

By the terms of contracts entered into with a local authority for the purpose of the Public Health Act, 1875, the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts he should certify to be due to such contractors respectively by the local authority:—

Held (affirming the judgment of Mathew, J.), that in respect of each contract the surveyor was liable to a penalty as having been "concerned or interested" therein within the meaning of s. 193 of the Public Health Act, 1875.

A local authority employed their surveyor, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay:—

Held (affirming the judgment of Mathew, J.) that the surveyor was liable to the penalty imposed by s. 193 of the Public Health Act, 1875.

APPEAL from the judgment of Mathew, J., on further consideration, reported 20 Q. B. D. 196.

The action was brought to recover penalties under the Public Health Act, 1875, s. 193. It appeared that the defendant was employed as town surveyor by the corporation of Ramsgate, the local authority for the borough. His appointment had been made in 1880 by the Ramsgate Improvement Commissioners, the former local authority under the Act. By the bye-laws made by

the commissioners under the Act the defendant was "to devote the whole of his time to the duties of his office," and was "to prepare the necessary plans and specifications of all works contracted to be done," and was "to take care that all such works were duly executed." He was also to be "responsible for the condition of the streets, both as regards repair and cleanliness, and was to see that the gully-holes, drains and sewers were kept in an efficient state." On the incorporation of the borough of Ramsgate in 1884, the defendant was re-appointed town surveyor by the corporation.

The plaintiff claimed from the defendant under s. 193 of the Public Health Act, 1875, ten penalties of 50*l.*, (1) three in respect of contracts entered into in 1884 and 1885 by the corporation for the sewering and paving of new streets; (2) seven in respect of contracts entered into in 1885 and 1886 by the corporation for the purposes of a scheme of drainage for Ramsgate. The sewering and paving contracts provided in each that the defendant should prepare bills of quantities, and that for this the contractors should pay him $2\frac{1}{2}$ per cent. on the amount payable under the contract, which amount he was to certify. The drainage scheme was prepared by the defendant as surveyor to the corporation, and received the sanction of the Local Government Board. Upon this the corporation passed a resolution appointing the defendant their engineer for the purposes of the drainage scheme, on the terms as to payment that he was to receive commissions on the price of the works, which were not to exceed 780*l.* The plaintiff alleged that two contracts between the corporation and the defendant were contemplated in this resolution, and claimed a penalty in respect of each contract. The corporation entered into five contracts respecting the drainage works, involving in all an expenditure of about 20,000*l.*, which sum was raised by loan. In each of these five contracts there was a provision for the payment by the contractor to the defendant as surveyor, in respect of bills of quantities, of $1\frac{1}{2}$ per cent. on the amount payable by the corporation to the contractor, calculated in the same way as the $2\frac{1}{2}$ per cent. in the sewering and paving contracts. In respect of each of such five contracts the plaintiff claimed a penalty.

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Mathew, J., on further consideration (1), gave judgment for the plaintiff for three penalties in respect of sewering and paving new streets, and one penalty in respect of the contract with regard to the sewage works. (2) The defendant appealed.

H. Tindal Atkinson, and *Crispe*, (*Finlay*, *Q.C.*, with them), for the defendant. The words of the section must be read with some qualification, otherwise they would include contracts of service made with the local authority. It is reasonable that they should be read with the limitation that the interest referred to would create a claim against the person making the contract with the local authority. Here the surveyor could not recover the percentage from the contractors, and the terms of the contract between them and the local authority cannot force on him an interest which would have the penal effect following on a breach of the first part of s. 193. The payment in the case of the drainage works was an allowance authorized by s. 189, which permits a local authority to pay its officers and servants allowances as well as salary or wages. They cited *Burgess* v. *Clark* (3), and *Melliss* v. *Shirley Local Board*. (4)

Kemp, *Q.C.*, and *H. F. Dickens*, for the plaintiff, were not called on.

LORD ESHER, M.R. In this case the defendant was an officer employed by a local authority within the meaning of s. 193 of the Public Health Act, 1875. An action was brought against him for penalties under that section, and the verdict was against him. On appeal it is said that he is not liable, and the question we have to determine is whether he is brought within the terms of the section.

(1) 20 Q. B. D. 196.

(2) The Public Health Act, 1875, s. 193, enacts: "Officers and servants appointed or employed under this Act by the local authority, shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer or servant is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of £50, which may be recovered by any person, with full costs of suit, by action of debt."

(3) 14 Q. B. D. 735.

(4) 16 Q. B. D. 446.

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The defendant was surveyor to the corporation of Ramsgate, who were the local authority. They determined to make certain improvements, in respect of which the adjacent owners would be liable to pay the expenses, but which the corporation were entitled to do. In order to do the work they, it is suggested, directed their surveyor to take out the quantities of the work to be done upon which contractors were to tender. It has now been admitted that they had no authority to give such a direction, because it was not within the scope of his employment, so that it amounts to this, that they requested the defendant to do the work. Then advertisements were sent out for tenders, which were to be based on the quantities already taken out, and in the contract there was a stipulation that the contractors should pay $2\frac{1}{2}$ per cent. on the contract price to the surveyor. There was no contract between him and the corporation that they should pay him for taking out the quantities, and no contract between him and the contractors, but there was between the corporation and the contractors that there should be a payment of $2\frac{1}{2}$ per cent. on the contract price. That percentage the defendant could only get paid to him by reason of the existence of that contract. In what way he could get it may be a question of doubt. I will not say that he could not maintain an action against the contractor for work done—it is not necessary to decide this—but it seems to me clear that if the money was in the hands of the corporation they would hold it as trustees for the surveyor, and he would get the money by reason of the existence of the contract. I go further than that, for in my opinion if it had been necessary the Court would have obliged the corporation to lend their name to the surveyor if he chose to bring an action against the contractor. In one way or the other he would obtain the money, and obtain it by reason only of the existence of the contract. The statement of the case in this way makes it impossible to say that the defendant was not interested in the contract, for it is not necessary that he should be able to sue in his own name, for no limitation which would lead to that is to be found in the Act.

That the defendant's position was such as this enactment strikes at seems to me to be clear. He was to be paid by a percentage on the contract price, and so the larger that was the larger would

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be his remuneration. Therefore it would be to his interest that he should make the quantities as large as they could be made. There is no reflection on his honour or integrity; but the statute affects all who are brought within the terms of it, and not merely those who yield to temptation.

With regard to the penalty incurred with respect to the sewage works, the defendant's position as to the liability of the contractors to pay him a percentage, is precisely the same as in the case I have already dealt with. I think, therefore, the judgment of the learned judge was right, and should be affirmed.

LINDLEY, L.J. I am unable to come to any other conclusion. The question is whether this gentleman is brought within the operation of s. 193 of the Public Health Act, 1875. Now the circumstances of this case, which have been alluded to by the Master of the Rolls, appear to me to be such that it is perfectly impossible to say that this gentleman, who is, confessedly, an officer or servant appointed or employed under the Public Health Act by the local authority is not in any way concerned or interested in those contracts. His interest in them is palpable and unmistakeable. He is to have 2½ per cent. upon the quantities supplied by him to the contractor, and the contractor is to pay that. Whether he could recover it by an action for work and labour done, or whether he would have to use the name of the corporation, or whatever other method he might have to pursue to get the money, it is perfectly obvious that he has an interest in the contract; and therefore I do not understand upon what ground the contrary can be argued. It does not seem to me to matter who the paymaster is. I wish to make some observations upon the word "allowances." It does not appear to me that a person is excluded from the operation of this section simply because he gets an allowance. If the allowance is such as to give him an interest in the contract, he is within the prohibitory words of the first part of it. This is not a question of exacting or accepting any fee or reward, but of being "interested in a contract;" and if a man is entitled to be paid an amount which varies with the contract price, it appears to me utterly immaterial to consider who his paymaster is. He becomes

immediately interested in the contract, and he is a person hit at by this section.

It appears to me, I confess, that the case is beyond all reasonable doubt, and I therefore think that this appeal must be dismissed.

LOPES, L.J. I very much regret being compelled to arrive at a conclusion adverse to the defendant in this case, but, having regard to the circumstances, which, in point of fact, are not disputed, I am unable to say that this defendant, who is the surveyor, is not within the words of the 193rd section a person interested in a contract made by the local authority, within the meaning of that section. According to my opinion, the case is within the language of that section, and is also within the mischief intended to be provided against by that section. I will only add this. If the percentage for the quantities had been payable by the local authority themselves instead of by the contractor, in my opinion the section would equally apply.

I think this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Kingsford, Dorman, & Co., for W. Hills, Margate.*

Solicitors for defendant: *Meredith, Roberts, & Mills, for W. A. Hubbard, Ramsgate.*

A. M.

1887
Nov. 8.

[IN THE COURT OF APPEAL.]

THE MAYOR, CONSTABLES, AND COMPANY OF MERCHANTS OF THE STAPLE OF ENGLAND *v.* THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

Estoppel—Negligence—Company—Custody of Seal—Loss by unauthorized use of Seal—Proximate Cause of Loss.

The plaintiffs, a corporate body, left their seal in the custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public funds, the property of the plaintiffs, was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock on the ground that it had been transferred without their authority by the defendants:—

Held, on the authority of *The Bank of Ireland* v. *Trustees of Evans' Charities* (5 H. L. C. 389), that assuming the plaintiffs had been negligent their negligence was not the proximate cause of the loss, and did not disentitle them from recovering in the action.

THE plaintiffs claimed in this action a declaration that they were entitled to 4250*l.* Consolidated 3*l.* per cent. Annuities, on the ground that they had been transferred by the defendants without the plaintiffs' authority. It appeared that one Drew, who was a clerk to the company, sealed with the seal of the company two powers of attorney under which the stock was sold. The defendants alleged that the plaintiffs gave Drew authority, or by their negligence and improper confidence in him held him out to the defendants as having their authority to seal and deliver the powers of attorney, and that the plaintiffs were estopped from disputing the validity of the same and of the transfers thereunder.

The case was tried before Pollock, B., when it appeared that the plaintiffs were an ancient corporation, created by a charter of the time of Edward III., which was renewed in the reign of Queen Elizabeth, and they were finally incorporated in 1669 by a charter of Charles II., with perpetual succession and a common seal. The objects for which the company was originally created had ceased to exist, and they had no office or place of business nor any books, except a minute-book kept by Drew. They had 4250*l.* stock, the dividends of which Drew received under a power

of attorney, and accounted for to the treasurer. The corporate seal was kept by Drew.

In May, 1884, an application was made to the defendants by a firm of stockbrokers for a power of attorney to two members of the firm for the sale of 3600*l.* of the above-mentioned stock. The bank sent a notice of this application directed to the plaintiffs, which was not acknowledged or returned. The stock was sold under the power of attorney, and the proceeds received by Drew. The remainder was subsequently sold under a similar power of attorney. The seal was affixed to the powers of attorney without any authority from the company, and at Drew's house before two attesting witnesses who were not corporators. Drew appropriated the proceeds of the sales, and was subsequently tried for the offence and convicted. The learned judge left three questions to the jury—first, did the plaintiffs hold Drew out to the defendants as having authority to affix the seal to the powers of attorney; secondly, had he on the facts proved an implied authority to affix the seal; thirdly, were the plaintiffs guilty of negligence so as to induce the defendants to act on the powers to transfer? The jury did not agree on the first two questions, but answered the third affirmatively.

The plaintiffs moved to enter judgment on the ground that there was no evidence in support of the finding of the jury, and on the ground of misdirection, and that the verdict was against the weight of evidence. The defendants also moved for judgment.

Finlay, Q.C., and *R. M. Bray*, for the plaintiffs.

Sir R. E. Webster, A.G., H. D. Greene, Q.C., and *Arbuthnot*, for the defendants.

The arguments and authorities cited sufficiently appear from the judgments of the Queen's Bench Division.

Cur. adv. vult.

1887. March 29. DAY, J. In this case we took time to consider our judgment, not because we entertained any doubt on the subject, but because we thought it better to take time to consider our judgment, so that we might be able to deal with the principles involved, and with the authorities cited in argument.

The case was that of an ancient corporation, not affected in

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respect of the details of the management of its business by any statutory authority, but exercising its rights, such as they had become in modern times, under the provisions of ancient charters. The corporation had, through changed circumstances, practically lost its reason for existence; it had ceased to transact any affairs or to fulfil any of its original objects. It had become, so far as we can understand, a mere dining club. It consisted of about thirty members, who were corporators. They maintained in point of form several of their ancient officers, whose duties had, however, ceased to have any reality; and the corporation had a fund of about 4500*l.*, which was invested in consols. The corporation still retained its common seal, which was entrusted to the custody of a solicitor named Drew, who filled the position of clerk to the company. In him unlimited confidence was reposed —that is to say, unlimited confidence in the sense of granting to him their common seal, and of allowing him to receive the dividends upon the sum invested in consols. The grossest negligence seems to have accompanied this confidence, because, notwithstanding all the warnings which most men experienced in the affairs of the world have had, that no man is to be trusted without the exercise of reasonable care by those who have to look after the affairs of other people, it seems to have been thought that the common seal and the affairs of the company might be entrusted to their clerk without any check or superintendence of any sort or kind being exercised over him by the corporators or any other of the officials of the company. One can scarcely imagine a case of grosser negligence than the negligence of all connected with the affairs of this company in their dealings with their clerk. It is not for me to suggest that every clerk, or any clerk, is to be suspected of evildoing, but it is idle to talk of the absence of necessity for exercising due and reasonable care over the officers of any corporate or other body. A person who was looking after his own affairs would take very good care to see that his seal, if it had any value, was looked after; but here a corporate body, who can only speak and act by its common seal, are content, one and all, to entrust that common seal to an officer over whom they exercise not the slightest superintendence.

Now, it has been said there can be no negligence attributable

to the corporators of this body, because it is not to be assumed that any man will commit the grave offence of availing himself of opportunities which are placed in his way—that no man ought to be assumed to yield to a temptation with which he is surrounded. That sort of reasoning does not commend itself to me, nor to my experience of the world; nor, I should think, to the common sense of men in general. I think this is a case of the very greatest negligence, and I must say that, if this were res nova, I should not hesitate to hold, upon the authority of a case which I venture respectfully to think was most properly decided—the case of *Young* v. *Grote* (1)—that the loss of the money which was occasioned by the fraud and forgery of Drew in applying this seal to two powers of attorney, by means of which he withdrew the whole of it and appropriated it to himself, ought to be borne by the corporation, whose negligence was in my judgment the direct cause of the loss. I cannot distinguish this case from that of *Young* v. *Grote*. (1) In that case the negligence which was held to disentitle the customer of a bank to recover from the bank money which they had paid upon a forgery, was negligence so trifling that it merely consisted in leaving in a cheque sufficient space into which the words "three hundred and" could be introduced, and in which the figures also could be similarly altered. I cannot distinguish the negligence there from the negligence of leaving the common seal, which is the only mode of expression the corporation has, in the custody of the clerk without any supervision, or check, or control whatever. By means of the possession of that common seal Drew was enabled to rob the corporation, or the Bank of England, as the case may be, of the sum of between 4000*l.* and 5000*l.*; and so laxly were the affairs of the company managed, that we find that the common seal was affixed on one occasion in the presence of a member of the Bar and a surgeon, and in another case in the presence of another member of the Bar and a surgeon also, and affixed not at the corporate place of business, but somewhere else. Under those circumstances the stock was transferred from the Bank of England, and the fraud was effected by the clerk. But much as I should wish to decide this case in favour of the

(1) 4 Bing. 253.

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defendants, I am bound by a case decided by the highest tribunal, which case I cannot distinguish from the present. I refer to the case of *The Bank of Ireland* v. *Trustees of Evans' Charities.* (1) I have tried, and tried in vain, to distinguish the facts of this case from the facts in that case, but I am unable to do so. With the exceptions that one is the case of a charity and the other is not, and one is the case of the Bank of Ireland and the other the Bank of England, and that one is the case of a common law corporation and the other of a statutory corporation, I see no distinction. We are bound by that case, which is undistinguishable in principle and on the facts. In my opinion, therefore, our judgment must be in favour of the plaintiffs, and very reluctantly I give it in their favour.

Arnold v. *Cheque Bank* (2) was also cited in argument. In that case it was properly held that the doctrine of *Young* v. *Grote* (3) did not apply. But *Arnold* v. *Cheque Bank* (2) is very distinguishable from *Young* v. *Grote* (3) and from the present case. In *Arnold* v. *Cheque Bank* (2) it was held that negligence could not be set up by way of estoppel, because it was not negligence directly conducing to the mischief. There a foreign merchant who had drawn a bill of exchange failed to send collateral notice of advice, and it was held that that fact could not be set up in an action upon the bill. That case has, I think, no application to the present. In principle the two cases might well stand together—*Arnold* v. *Cheque Bank* (2) as it was decided, and the present case if decided, as I should wish it to be, in favour of the defendants. In *The Bank of Ireland* v. *Evans' Trustees* (1) it was held that negligence such as exists in this case was not negligence which estopped a party from making a claim against a person who had been defrauded entirely by the negligence of the person who sought to recover the money. As I have said, I cannot distinguish that case, and I am, therefore, of opinion that our judgment must be in favour of the plaintiffs.

WILLS, J., read the following judgment:—It was contended for the defendants that the seal of the plaintiff corporation having

(1) 5 H. L. C. 389. (2) 1 C. P. D. 578.
(3) 4 Bing. 253

been affixed to the transfer by a corporator in whose custody the plaintiffs allowed the seal to be, the corporation was bound by it; (1) as really the deed of the corporation, (2) as so to be treated in the hands of the defendants because the plaintiffs were estopped from denying it.

Upon the first point there appears to me to be no reason in principle why a deed sealed with the seal of the corporation fraudulently affixed by a corporator should have any more efficacy than one to which the seal has been fraudulently affixed by anyone else. I have been unable to find any authority for such a proposition, and none was shewn at the bar.

The acts of a corporation are those of the major part of the corporators, corporately assembled: Com. Dig. tit. Franchise, F. 11; and, omitting the words "corporately assembled," this is declared by 33 Hen. VIII., c. 27, to be the common law. This means that, in the absence of special custom, the major part must be present at the meeting, and that of that major part there must be a majority in favour of the act or resolution. It was so decided in Easter Term, 1693: *Hascard* v. *Somany* (1), quoted in Viner's Abridgment, tit. Corporations, G. 3, pl. 7; and it was said by Lord Mansfield in *Rex* v. *Monday* (2) to be undoubted law. By "corporately assembled" it is meant that the meeting shall be one held upon notice which gives every corporator the opportunity of being present: see *Smyth* v. *Darley*. (3) The notice need not necessarily be special, but there must be such knowledge, or such means of knowledge, as to give each corporator the opportunity of attending.

This, therefore, is the way in which the corporate authority must be exercised; and it follows that it is thus, and thus only, that the resolution to use the corporate seal can be arrived at. I am speaking, of course, of corporations not being trading bodies, to which essentially different principles apply: see *Re Barned's Banking Co.* (4) The affixing the seal is not enough; there must be a delivery of the deed also: *Derby Canal Co.* v. *Wilmot*. (5) Primâ facie, putting the seal imports delivery; yet, if it be

(1) Freem. 504.
(2) Cowp. 530, at p. 538.
(3) 2 H. L. C. 789.
(4) Law Rep. 3 Ch. 105, at p. 116.
(5) 9 East, 360.

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intended otherwise, it is not so; and then, if delivery be made upon a different occasion, and not at a corporate meeting, it must be done by some person acting under a power of attorney from the corporation: *Anon.* (1) It seems to be very old law that (except under a power of attorney, which of course must be subject to the same rules as any other deed) the delivery must be made at a duly constituted meeting of the corporation: Brooke's Abridg. tit. "Corporations," pl. 72, citing the Year Book, 9 Ed. 4, p. 39—a passage which entirely bears out the Abridgment.

It would seem to follow that the seal must be affixed at a meeting, and as the act of the meeting, or it is nothing. I believe that this was the usual practice in ancient times. In 1 Lev. 237, will be found an indorsement on a corporate deed, which has the appearance of being a common form, "sigillatum et deliberatum in præsentia," &c.; and I have a strong impression that I have both seen and heard of old deeds bearing a similar attestation clause.

If this view be correct it disposes of all the arguments derived from any supposed practice of the corporation to allow deeds to be executed for them by affixing the seal otherwise than at a corporate meeting, or from any supposed authority to their clerk to use the seal for the purpose of executing their deeds, or any ratification of his act in having done so. I will add that in my opinion there is no evidence of any such practice or authority worthy of a moment's consideration.

It appears to me, therefore, to be made out that this transfer was not the deed of the plaintiffs, but a forgery by their clerk. A forgery can give no title, and those who rely upon it must be able to shew some extraneous ground—such as that of estoppel—why they should be entitled to act upon it. This I take to be the substance, when they come to be carefully examined, of the ancient authorities relied upon by the Attorney-General; and, when so understood, they are in harmony with the modern authorities. In Glanville, book 10, ch. 12, it is said that the man who intrusts his steward with his seal will be bound by it if the steward seals a deed with it, for he should have taken

(1) 1 Vent. 257.

better care of it. Bracton (edition published by the Record Commissioners, and edited by Sir Travers Twiss, vol. vi., p. 126), says that a man may get rid of his deed by shewing various matters, such as duress, mistake, or the like; but adds the qualification that there must be nothing in the way of negligence on his own part—as in intrusting his seal to his seneschal or wife. Britton says that a man may plead that the writing ought not to affect him, for when it was made he had lost his seal, and caused it to be cried and published at the churches and markets, so that if anything was made under that seal after a certain day on which it was lost, it ought not to affect him: book i., ch. 29, pl. 17. A curious account is given in Mr. Nicholl's note (vol. i., p. 164, of his edition) of a plea of this description relating to the seal of Arnald de Thorley, which was met and defeated by production of a record of an acknowledgment at the Hertford Assizes, 39 Hen. III., of the seal in question by the said Arnald; and two advertisements of the loss of a seal, warning the public that an instrument sealed with it after a certain day would be a forgery, are given in Blount's Law Dictionary, tit. "Seal" and "Sigillum." The passage from Bracton is reproduced in Fleta, who wrote towards the end of the 13th century, but without any additional remarks.

It is interesting to observe that the principle which these passages embody has undergone no change during the course of more than six centuries. It is the same as that embodied in *Young* v. *Grote* (1). A person whose negligent act has directly contributed to the forgery must, as between himself and the person who has taken the forged instrument and acted upon it to his own detriment as a genuine one, bear the loss. But as illustrations of the particular application that should be made of them to circumstances such as those now in question they are useless. To begin with, they all relate to the seals of individuals, not of corporations which must be kept by some one, and I can see no reason why the seal of the corporation should not be kept by their clerk, although he be one of the corporators, as well as by anyone else. Trust must in such matters be reposed somewhere, and to all appearances it could hardly have been trusted to a

(1) 4 Bing. 253.

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more fitting person than to the delinquent in the present case. But, however this may be, it is obvious that what degree or kind of act or omission will afford ground for an estoppel is a matter that must vary infinitely from age to age and from generation to generation. The precautions which appear to be natural in one century may appear pedantic and unnecessary in another. Centuries ago—I am told by a gentleman at the Bar very familiar with the local records at Exeter, Mr. Stuart Moore—the seal of the corporation was kept under three keys which were in different hands, and which are repeatedly referred to in ancient documents; and it is undoubtedly the practice of many limited companies to take somewhat similar safeguards. But there can be no inflexible and unvarying rule of law as to that which is essentially a mixed question of fact and law, and it is not therefore surprising to find that the particular act, which to our forefathers appeared in the case of an individual to be so wanting in care as to make the person who had rashly intrusted his seal to wife or seneschal or steward responsible for any forgeries that might be committed by means of it whilst out of his custody under those circumstances, should have been held in modern times in the case of a corporation to afford no ground for any charge of negligence, nor to estop the corporation whose confidence had been abused from setting up that the deed was a forgery. Upon this part of the case we are relieved from all difficulty by the decision of the House of Lords in *The Bank of Ireland* v. *Trustees of Evan's Charity*. (1) In that case facts undistinguishable from those of the present case were held not to exonerate the bank which had given effect to a forged transfer.

I do not profess to be able to follow the reasoning of the opinion delivered by the learned judges who advised the House of Lords in that case. They distinguish *Young* v. *Grote* (2) from the case under consideration, on the ground that in the latter case the transfer could not have been put into due form unless the attesting witnesses had been careless or dishonest, and they seem to treat that as an event so unlikely that precautions against its possibility were not naturally called for. I should have thought it a thing much more to be expected than the

(1) 5 H. L. C. 389. (2) 4 Bing. 253.

forgery which was made practicable by the careless way of filling in the cheque in *Young* v. *Grote*. (1) The House of Lords, however, have decided otherwise, and we cannot go behind their decision, and I cannot distinguish it from the present case. But for that case I should have thought that the mode of keeping the seal was eminently calculated to facilitate, if not to invite, the commission of forgery. All that remained for a dishonest man to do was the physical act of affixing the seal, which is a much easier operation than that of imitating handwriting and filling in the cheque.

The case in the House of Lords, and the circumstances under which a party acting upon a forged instrument is nevertheless entitled to rely upon it, were carefully and elaborately discussed in *Arnold* v. *Cheque Bank* (2), and our judgment is entirely in accordance with the principles there laid down.

It is sought to distinguish the case of *The Bank of Ireland* v. *Trustees of Evans' Charity* (3) from the present case, on the ground that in that case there was a statute which required certain formalities to make the use of the seal valid, and the bank, it was said, were to be deemed to know that they were requisite, and so to be put upon inquiry.

It seems to me to make no difference whether that which is necessary to validate the use of the seal depends upon statute or upon the common law. Every one must be taken to know that it is possible that a seal of a corporation may have been so used as to make the deed bearing the impression of the genuine seal a forgery, and to be therefore put upon an inquiry, in the case of an instrument so authenticated, of a different nature from that which is involved in the case of every instrument bearing a signature—viz., whether the signature is genuine; and it seems to me to make no difference at all that in the one case the subject-matter of inquiry is whether the seal has been duly affixed by the authority of the trustees, and with incidents required by Act of Parliament, and that in the other it is whether it has been duly affixed as the act of the corporation, and with incidents required by the common law. Reliance was also placed by the

(1) 4 Bing. 253.

(2) 1 C. P. D. 578.

(3) 5 H. L. C. 389.

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defendants on *Shaw* v. *Port Philip Gold Mining Co.* (1) It is sufficient to say that that decision rested upon the fact that it was within the scope of the secretary's regular employment to issue share certificates, and that in this case the person who forged the transfer in question was not shewn to have any analogous duty in respect to transfers of stock.

It is said that our decision involves a hardship upon the bank. That we cannot help. Somebody must suffer for such a transaction as that now in question. Nor is the position of the bank so difficult as has been suggested. Mr. Bray pointed out that by the National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 24, the bank may, if the circumstances appear to them to make it expedient, so that they are the sole judges of the necessity, require evidence of the title of any person claiming a right to make the transfer. This protection, however, does not apply to the present case, as it is not the title of the plaintiffs that is in question. But the bank are entitled, apart from statute, to make proper inquiries to satisfy themselves of the authenticity of the transfer before they act upon it; per Abbott, C.J., in *Sutton* v. *Bank of England.* (2) They have not done so, and must take the consequences. The plaintiffs' motion for judgment must be granted.

The defendants appealed.

Sir R. E. Webster, A.G., H. D. Greene, Q.C., and *Arbuthnot,* for the defendants.

Finlay, Q.C., and *R. M. Bray,* for the plaintiffs.

LORD ESHER, M.R. In this case it is clear that the defendants have transferred stock of the plaintiffs' to a stranger upon the strength of a document which was not in fact authorized by the plaintiffs. The question we have to determine is, whether, notwithstanding the want of authority, the plaintiffs have no remedy against the bank.

Primâ facie, the presumption is that if the bank have transferred property without authority to a third person they cannot protect themselves from liability for so doing. But it is urged

(1) 13 Q. B. D. 103. (2) 1 C. & P. 193, at p. 195.

that the plaintiffs had so acted as to entitle the bank to excuse themselves from liability on the ground that the plaintiffs were negligent in the matter, that is, that they did, or omitted to do, something which if they had used ordinary care they would not have done or omitted to do. It has been urged besides that there were circumstances which ought to have been left to the jury, and which would have authorized them in saying that Drew was held out by the plaintiffs as having authority to affix the seal to the powers of attorney. On this point I think we are all perfectly clear that there was no evidence which would have warranted such a question being left to the jury. The learned judge only left that question by way of precaution, but there was no evidence which would justify the jury in answering, and the fact of their not having answered is immaterial. We are also clear that there was no implied authority, and the whole case turns on the remaining question, and the point for us to consider is whether there was any evidence which should have been left to the jury on that question. This raises, as it seems to me, two points, whether there was any evidence of negligence, and whether, if so, it was evidence which ought to have been left to the jury.

As to the first of these questions I do not think it necessary to decide the point. I have an opinion on it, but I admit it would be difficult for us to say that a mercantile jury might not say there was negligence. I will assume that it was proved that there was negligence on the part of the plaintiffs, and consider whether it was such negligence as would exonerate the defendants. That will depend on the meaning of the decision of the House of Lords in *The Bank of Ireland* v. *Trustees of Evans' Charities* (1), from which this case, so far as the facts go, cannot be distinguished.

I take it that in that case the principle was laid down by Parke, B., in giving the opinion of all the judges who were summoned to advise. I think it clear that he first laid down a principle to be applied to all cases which could be brought within it, and then considered the facts of the case before him to see whether they brought it within the principle. The opinion

(1) 5 H. L. C. 389.

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is thus given: "We all concur in opinion that the evidence given, which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it in the hands of Mr. Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence" not "of negligence," he does not say that, but "of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void." He distinguishes therefore between negligence generally and that species of negligence which alone would warrant the jury in finding that the plaintiffs were disentitled to insist on the transfer being void. Apply that language to the present case and we have here to consider, not whether there was negligence, but whether there was that species of negligence which is described. What is that negligence? "We concur with Mr. Justice Jackson, Justices Ball, Crampton, and Torrens, and the Chief Justice Lefroy, in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself." Now when you find a judge so expressing himself "in the transfer itself" or "immediately connected with the transfer itself," that of itself seems to me to shew that he meant the latter to be a very strong expression almost equivalent to "in the transfer," and the way to construe it is that the negligence must be proximately connected with the transfer itself. That that was the meaning of the learned judge seems to me to be further made manifest by the way in which he treats the case of *Young* v. *Grote* (1) immediately afterwards. "Such was the case," he says, "of *Young* v. *Grote*." (1) That is, *Young* v. *Grote* (1) was a case in which the negligence was in or immediately connected with that which happened. How does he make that out? "That the drawer having thus caused the banker to pay the forged cheque by his own neglect." In what? "In the mode of drawing the cheque itself, could not complain of that payment." Therefore the way in which he deals with *Young* v. *Grote* (1) as an example of what he had said before seems to me to shew that the negligence must be proximately connected with the result. The principle so laid

(1) 4 Bing. 253.

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down was adopted by the Lords, and it became the decision of the House of Lords, and binding on all courts.

Now has that view of it, which I think is the fair view of what they intend to say in that case, struck subsequent judges in the same way? It seems to me that it has, and that in *Swan* v. *North British Australasian Co.* (1) the judges in the Exchequer Chamber in terms put that meaning on the words which were adopted by the House of Lords. Blackburn, J., said: "What I consider the fallacy of my Brother Wilde's judgment is this: he lays down the rule in general terms, 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, against such persons, to shew that state of facts did not exist.' This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake." Byles, J., says: "Assuming that he was chargeable with negligence, still I think the plaintiff can recover, because the plaintiff's assumed negligence was not the proximate cause of the transfer by the defendants." Therefore they adopted the view that although there is the neglect calculated to mislead, and although that neglect does mislead, nevertheless it is no answer if it is not the proximate cause of the loss. There are other causes which have been cited in which the same view is taken of that decision of the House of Lords. When I find that all Courts that have dealt with it since have so understood it I cannot doubt that we ought to say that is the meaning of the House of Lords.

Then that reduces us to this. Assume that there was negligence by the plaintiffs in this case calculated to deceive the bank, and that by that negligence the bank was deceived. Assume all that, still, according to the ruling of the House of Lords, there was no case to go to the jury upon the question whether there was negligence which would excuse the defendants, because that negligence, if it existed, was not the proximate cause of that which the bank did, namely, transferring the stock.

(1) 2 H. & C. 175.

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Now, inasmuch as the negligence charged against the plaintiffs is their implicit trust in Drew, and entrusting him with the seal, there were several circumstances which existed between that negligence of the plaintiffs and that which the bank did, namely, transfer the stock, and which prevented that preliminary negligence of the plaintiffs from being the proximate cause of what the bank did. Therefore I am of opinion that there was no case to be left to the jury on the question, not whether there was negligence, but whether there was such a negligence as would excuse the defendants from having transferred the stock without the authority of the plaintiffs. I am of opinion there was no evidence to go to the jury, and therefore the defendants were without defence, and this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. If the question were simply whether the plaintiff corporation had departed from the reasonable precautions which they might have been expected by business people to take about the custody of their seal, having regard not merely to the fact that they were a corporation, but to the fact that they were such a peculiar corporation, I should have felt a difficulty in saying that we could disturb the verdict of a commercial jury on that point. After all, it being a question of fact what is the care which a business person ought to take in business transactions, a commercial jury might perhaps not be an improper tribunal to have that question left to it to decide. But there is a further point. Let us assume, for the purpose of argument, that the plaintiff corporation here were incautious and careless in the way in which they dealt with their seal under the circumstances. In order that the Bank of England should be excused in the present action, it must be shewn not merely that the plaintiff corporation were careless, but that the carelessness of the corporation directly and proximately led to the loss of the property which the banker was called upon to make good.

In the case of *The Bank of Ireland* v. *Trustees of Evans' Charities* (1), it seems to me to be clear that Baron Parke, whose opinion was adopted by the learned Lords who gave the

(1) 5 H. L. C. 389.

judgment of the House of Lords, laid it down as the opinion of himself and the other judges, that the negligence which would deprive the plaintiff of his right to insist that the transfer in that case was invalid, must be negligence in or immediately connected with the transfer itself, and what he meant by that language I do not think can be left in doubt, first of all because he in using it expresses his concurrence with the Irish Exchequer Chamber (1), and Jackson, Ball, Crampton, and Torrens, JJ., and Lefroy, C.J., in respect of that proposition, and because subsequently he proceeds to enlarge upon it and explain it himself. I have taken the trouble to verify the references to these judgments, and it appears to me that they all in different language and with different degrees perhaps of lucidity adopt the view that there was a difficulty in the way of the defence, which arose from the fact that the carelessness of the plaintiff in that particular case, even if it furnished an occasion for the loss which was sustained afterwards, had not directly led to it. But we are not left to pick out the meaning of Parke, B., from reference to the judgment of the Court below. He proceeds to explain what he means, and says, "If such negligence," that is, the negligence charged in the particular case, "could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney." That that is the true explanation of what is not ambiguous or difficult language to interpret follows, it seems to me, from the decision of the Exchequer Chamber, by which we are bound in *Swan* v. *North British Australasian Company* (2), and by the judgment of Blackburn, J., who, as the Master of the Rolls, has pointed out, corrects a definition given by Baron Wilde in the Court below. He corrects it by saying that negli-

(1) 12 Ir. Law Rep. 365. (2) 2 H. & C. 175.

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gence to work an estoppel must be a proximate negligence, and it will not do if it is merely a remote one.

Now here can it be said that the negligence, if it was negligence, of the plaintiff company was the proximate cause of the transfer? It seems to me that we must answer that there were no grounds upon which the jury could think that it directly led to the transfer. Mr. Drew was a person of position and of reputation; he was a man who might be trusted, to outward appearances, as much as any man in the country, and even if it was careless for the corporation to leave their seal with him, was it a direct and immediate consequence of that carelessness that he would commit the forgery he committed in the power of attorney, and that the bank would be induced by that to transfer the stock? It seems to me here that the proximate cause was the felony and crime of Drew, and that it cannot be said that the felony was itself either the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs. On that ground, it seems to me the case is covered by authority, and the judgment of the Court below must be affirmed, though I do not altogether say that I agree with every expression used by the learned judges in their judgment.

FRY, L.J. I agree. I shall add but very few words, and those few words will be on the question of negligence.

It appears to me that two questions arise. In the first place, was there any evidence of negligence at all? and in the second place, if there was, was it negligence so immediately conducive to the transfer that the plaintiffs are estopped from saying the transfer is not their act? With regard to the first question, I shall assume that there was evidence of negligence, at the same time I shall not forbear expressing my doubt as to whether there was any such evidence. It is not necessary to decide it, but it is enough for me to say that I am not clear that there was any evidence at all of negligence, for if there was it appears to me clear, on the authority which has been so much discussed in this case, that of *The Bank of Ireland* v. *Trustees of Evans' Charities* (1), that it was not sufficiently in or immediately connected with the

(1) 5 H. L. C. 389.

transfer itself as to justify the jury in finding the verdict at which they arrived or to afford any evidence to go to them on the point.

In my judgment it is impossible to discriminate the two cases. The learned Attorney-General made an ingenious attempt to do so. He fastened upon this fact, that in the attestation clauses of the powers of attorney in that case the attestation asserted that the sealing and delivery had been in the presence of the witnesses by the successive chairmen of the company, and he said that that point was referred to by Parke, B., when delivering the opinion of the judges, that that was the extraordinary event which could not have been anticipated and which intervened between the giving of the seal to the clerk and the execution of the transfer, that that circumstance did not exist in this case, and that, therefore, the former case was not an authority in point; but I cannot come to that conclusion. It appears to me that the attestation, so far as it referred to the presence of the chairman, was immaterial. The terms of the statute which required the attestation did not require that it shall be executed in the presence of the chairman at all, and therefore I cannot help concluding that that is really an immaterial matter, though, no doubt, the fact that certain persons so certified is evidence of their carelessness. I think that the real circumstances of the cases are identical, and it would be drawing an unreal distinction if we attempted to rest on the point the Attorney-General has laid before us. The principles laid down in that case are there applied to circumstances identically similar with the present case. We are bound by those principles there laid down, and I can find no sufficient reason in the facts of this case to hold that they do not apply.

Appeal dismissed.

Solicitors for plaintiffs: *Watney, Tilleard, & Freeman.*
Solicitors for defendants: *Freshfields.*

A. M.

1888
June 21.

[IN THE COURT OF APPEAL.]

COCH *v.* ALLCOCK & Co.

Practice—Evidence Abroad—Commission—Rules of Supreme Court, 1883, *Order* XXXVII., *r.* 5—*Discretion.*

A party is not entitled to a commission ex debito justitiæ upon shewing that a material witness is resident out of the jurisdiction. The granting of the commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case.

In a case where it was shewn that witnesses were out of the jurisdiction and their examination on commission abroad would be much less expensive than bringing them to the trial in England, and there was nothing to shew that their presence in court was essential, the Court of Appeal affirmed the order of the Queen's Bench Division that the commission should issue.

APPEAL from the decision of the Queen's Bench Division (reported supra, p. 1).

The facts, as they appeared on appeal, were as follows: The action was brought by the plaintiff, who was a Norwegian merchant, carrying on business in Norway, for money payable in respect of the price of ice shipped in Norway for a port in England and there delivered to the defendants. The defence claimed a reduction of the price for breach of contract in respect of alleged deficiency in weight and inferior quality of the ice delivered. The amount in dispute was about 24*l.* An application was made at Chambers on behalf of the plaintiff for a commission to Norway to examine the plaintiff and his foreman and other witnesses. The master made an order for the commission, which was reversed by Denman, J. The Divisional Court (Field and Wills, JJ.) reversed the order of Denman, J., and granted the application for a commission as asked for. The plaintiff's affidavits shewed that the evidence of the witnesses to be examined on the commission was material with regard to the weight, size and condition of the blocks of ice when shipped and when delivered, and it was stated that the witnesses were resident in Norway out of the jurisdiction, some of them not being in the plaintiff's employment. It was also stated that the expense of bringing the witnesses to England, including their loss of time, would be 10*l.* per head, and would probably amount to more than

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100*l.*, whereas the expense of examining them on commission in Norway would probably only be about 25*l.* The defendants' affidavits asserted that the witnesses who loaded the ice on board the ship and unloaded it, and whose evidence would be material as to its condition, &c., were in the employment of the plaintiff.

Butler Aspinall, for the defendants. It lies on the party applying for the commission to shew circumstances which render it reasonable and necessary for the ends of justice that he should be allowed to take the evidence of the witnesses on commission. It is submitted that no sufficient case for a commission is here made out. The plaintiff's affidavits do not shew that he cannot procure the attendance of the witnesses at the trial: *Lawson* v. *Vacuum Brake Company*. (1) The presumption with regard to witnesses in his own employment is that he could do so. At any rate, no sufficient case has been made out for the plaintiff's being himself examined on commission, which ought only to be allowed under very exceptional circumstances. The consideration of the comparative expense of examining the witnesses on commission and bringing them over here is no sufficient ground for the application. If it were, a foreign plaintiff who chooses to sue in this country, and whose witnesses reside abroad, could always have all his evidence taken abroad on commission.

W. A. Meek, for the plaintiff. It is submitted that, where the application is made bonâ fide, and it is shewn that a witness's evidence is material and that he is out of the jurisdiction, the granting of a commission is ex debito justitiæ. In *Kemp* v. *Tennant* (2), Mathew, J., is reported to have said that the late Mr. Justice Willes was of that opinion. The amount at stake in the particular action is small; the question involved is however one of some importance to the plaintiff, viz., whether in the case of contracts for the sale of ice made on such terms as this contract, he, as the vendor, or the purchaser is to stand the loss caused by natural deterioration of the ice during the voyage. The plaintiff must fight the question or he would always have to submit to such deduction as the purchaser might choose to make from the price in respect of any deterioration of the ice during the voyage.

(1) 27 Ch. D. 137. (2) 2 Times Law Rep. 304.

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Having regard to the nature of the issue, and the much greater expense that would be occasioned by bringing the witnesses over as compared with that of examining them on commission in Norway, and to the distance at which the plaintiff lives and the time he would lose by coming over, it is reasonable in such a case as this that the plaintiff should be allowed to prove his case in the cheaper way. It is not denied that the authorities shew that, where from the nature of the case and the issues involved, or from other circumstances, the personal presence of the witness in court for the purpose of cross-examination is essential, more particularly in the case of a plaintiff himself, the order for a commission will not be made. But there are no considerations of that sort in this case. There is nothing in the nature of the issue or otherwise to make the personal presence of the plaintiff or any of the other witnesses essential. The only question at issue and to which the evidence will be directed is a mere business question as to the size, weight and condition of the blocks of ice when shipped and when delivered by the ship. In the cases in which the Court has refused a commission to examine a party or witness, the nature of the case was obviously such as to make the personal presence of the witness in court most essential. In *Lawson* v. *Vacuum Brake Company* (1) the application was not made bonâ fide, and the witness proposed to be examined on commission had been a party to the transactions sought to be impeached by the plaintiff on the ground of fraud. With regard to witnesses not in the plaintiff's employ, he cannot insure their attendance at the trial.

[LORD ESHER, M.R. The Court below seem to have had their attention mainly directed to the suggestion that the necessary witnesses were in the plaintiff's employment. But, if it be so, that circumstance is not conclusive, and it seems to me that their decision as to that point was right.]

The plaintiff could not compel witnesses to come to England even if they are in his employment. He also cited *Armour* v. *Walker* (2); *Light* v. *Governor &c. of Anticosti* (3); *Nadin* v. *Bassett* (4).

(1) 27 Ch. D. 137.
(2) 25 Ch. D. 673.
(3) 4 Times Law Rep. 430.
(4) 25 Ch. D. 21.

LORD ESHER, M.R. In consequence of the case cited we have communicated with Mathew, J., and he tells us that he never meant to say or to cite Mr. Justice Willes as having said that the grant of a commission was ex debito justitiæ in the sense in which the expression was used by the plaintiff's counsel in argument. It is clear that, according to the established practice, it is a matter of judicial discretion, and the commission ought only to be granted on reasonable grounds being shewn for its issue. The matter being one of discretion, it is impossible to lay down any general rule as to when a commission will be granted. It must depend on the circumstances of the particular case. The Court must take care on the one hand that it is not granted when it would be oppressive or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when from the circumstances there is a difficulty in the way of witnesses attending at the trial. All the circumstances of each particular case must be taken into consideration. With regard to the case of a plaintiff asking for a commission to examine himself, that also appears to me to be a matter of discretion, but the discretion will be exercised in a stricter manner, and the Court ought to require to be more clearly satisfied that the order for a commission ought to be made. In the present case we are not prepared to overrule the discretion exercised by the Court below in making the order for a commission, taking into consideration all the circumstances of the case, and what has been shewn with regard to the comparative expenses of a commission, and of bringing the witnesses to this country; but we have decided to impose terms. The costs of the commission must be in the discretion of the judge who tries the case.

LINDLEY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff: *Turnbull, Tilly, & Mousir.*
Solicitors for the defendant: *Wilson & Son.*

E. L.

1888
June 5.

IN RE AN ARBITRATION BETWEEN THE AUTOTHREPTIC STEAM BOILER CO., LIMITED AND TOWNSEND, HOOK & CO.

Arbitration—Reference by Consent—Costs of negotiating and settling Terms of Submission—"Costs of Reference."

Where upon a reference by consent, but not in a cause, the costs of the reference are left in the discretion of the arbitrator, the costs of negotiating and settling the terms of the submission may be allowed on taxation as "costs of the reference."

APPEAL from an order by Denman, J., at Chambers reviewing the master's taxation of costs.

It appeared that an action had been brought on contracts for the erection of boilers and coke ovens by the plaintiff company for the defendants. The contracts containing a general arbitration clause, an order was made under the Common Law Procedure Act, 1854, to stay the proceedings. The parties negotiated, and, after conferences and correspondence, finally settled an agreement of submission of all matters in difference to arbitrators and an umpire, which provided that the costs of the reference and award should be in the discretion of the arbitrators or umpire as the case might be. An award was made by the umpire in favour of the plaintiffs, and that the defendants should pay the costs of the plaintiffs of and incidental to the reference and the costs of the award.

The plaintiffs carried in their bill of costs for taxation. The items consisted of charges for "drawing instructions to counsel to advise and settle submission to arbitration and fair copy. Fee to counsel therewith. Letters to the defendants' solicitors with the draft submission, perusing alterations, instructions to counsel to further advise on the draft, fair copy thereof, writing therewith, engrossing agreement for submission. Correspondence and interviews as to a change of one of the arbitrators," &c.

The master disallowed the costs of the submission to arbitration on the ground that they were not provided for; that the submission was no part of and was not included in the arbitration; that it was analogous to an order of reference, which was not included in the reference but in the cause; and that his decision was in accordance with the practice which had previously obtained.

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Moulton, Q.C., and *J. L. Walton*, for the defendants. The plaintiffs are entitled to no costs prior to the commencement of the reference. Even where an order of reference is made in an action the costs prior to the reference are not treated as costs of the reference. There is no express authority on the present point, but the master has properly followed the analogy of a reference under an order of Court. The arbitrator has no means of considering the propriety of costs incurred before the commencement of the reference.

Bigham, Q.C., and *J. D. Fitzgerald*, for the plaintiffs. Where an action is referred the order of reference is made in the action, and costs prior to the reference are therefore allowed as costs of the action, and could not properly be allowed again as costs in the reference, or they would be allowed twice. But this is the case of a reference, not in an action but, by an agreement, which is the first step in the reference, as the writ is the first step in an action: *In re an Arbitration between Walker & Son* v. *Brown* (1), where it was held that "power in a submission to arbitration over the 'cost of the reference' includes power to award the costs of the award" is applicable. If there were no submission to arbitration the reference could not begin.

Moulton, Q.C., in reply. The cost of constituting a tribunal cannot be deemed costs in the tribunal.

HUDDLESTON, B. I have no doubt whatever that my brother Denman was right; and that the master was wrong in not having allowed all the expenses incurred preliminary to the agreement to refer, but necessary for the purpose of putting the agreement of the parties into form. They agreed that the disputes should be referred and that the costs of the reference and award should be in the discretion of the umpire. What are the costs of the reference? Those costs which are incidental to the reference and incurred in bringing it about,—costs of arrangements, meetings, discussions, consultations, conferences, and all that are necessary to bring the parties ad idem—to the point on which they agree, but up to which there must be preliminary steps. The master thought that he was bound by the practice which had previously

(1) 9 Q. B. D. 434.

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obtained, but I think that he failed to discriminate between a reference in an action and the present case of a reference by agreement, and overlooked the distinction suggested by the learned counsel for the plaintiffs, that when a cause at nisi prius is referred "the costs of the arbitration and award to be in the discretion of the arbitrator," those costs begin only at the time of the reference, because all the costs prior to the reference are allowed as costs in the cause and the arbitrator would only have to deal with the costs of the reference and award. In *In re an Arbitration between Walker & Son and Brown* (1), which was a reference by agreement, Field, J. said, "Common sense suggests that the power over the costs of the reference includes a power to give the costs of the award. If no award was made, the reference would never be finished." Here if no arrangement had been made prior to the reference there never would have been any reference.

CHARLES, J. I am of the same opinion. There had been in the original contracts an agreement to refer. But it was necessary to formulate the agreement and reduce it into the shape of a regular submission. I have looked through the plaintiffs' bill, and all the items are applicable to the formulating of the submission and appear to be costs of the submission. The master was misled by a false analogy. He referred to the practice with regard to a reference in an action where the costs of the order of reference are treated as costs of the cause and not of the reference. There the order of reference is properly enough part of the costs of the cause, being simply a step in the cause. But here there is no cause. I think the costs of the submission are properly costs of the reference for the reasons given by my learned brother, and that Denman, J. was right. The costs of the award have been held to be "costs of the reference" and I think the costs of the submission may be so likewise.

Solicitors for plaintiff: *Valpy, Chaplin, & Peckham.*
Solicitors for defendant: *Nickinson, Prall & Nickinson.*

(1) 9 Q. B. D. 434.

J. R.

BLAIR AND ANOTHER *v.* EISLER. 1888 *June* 13.

Solicitor—Privilege—Action commenced in High Court—Costs—County Courts Acts, 1849 (12 & 13 *Vict. c.* 101), *s.* 18, *and* 1867 (30 & 31 *Vict. c.* 142), *ss.* 5, 34.

Sect. 5 of the County Courts Act, 1867, which deprives plaintiffs in actions commenced in the High Court of costs if less than 20*l.* in contract, or 10*l.* in tort, is recovered, applies to an action in which a solicitor is plaintiff.

APPEAL by the defendant from an order made at chambers by Charles, J., allowing the plaintiffs' costs of the action on the High Court scale.

The plaintiffs, who were solicitors, commenced an action in the High Court to recover the amount of a bill of costs, and applied for judgment under Order XIV. The defendant obtained leave to defend, and pleaded a counter-claim. An order was made under 19 & 20 Vict. c. 108, s. 26, for the trial of the cause in the Clerkenwell County Court. At the hearing the defendant produced no evidence in support of his counter-claim, and the verdict was for the plaintiffs. The amount recovered was between 19*l.* and 20*l.*

The following are the clauses in the County Courts Acts on which the question turned:—

Act of 1846 (9 & 10 Vict. c. 95), s. 67; "No privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any Court holden under this Act."

Act of 1849 (12 & 13 Vict. c. 101), s. 18: "No privilege shall be allowed to any attorney, solicitor, or other person, to exempt him from the provisions of this Act, or the said Act for the more easy recovery of small debts and demands in England" (9 & 10 Vict. c. 95).

Act of 1867 (30 & 31 Vict. c. 142), s. 5, as amended by 45 & 46 Vict. c. 57, s. 4: "If in any action commenced after the passing of this Act in any of Her Majesty's superior courts of record the plaintiff shall recover a sum less than twenty pounds if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default or otherwise, he shall not be entitled to any costs of suit, unless the Judge certify on the record

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that there was sufficient reason for bringing such action in such superior court, or unless the Court or a Judge at chambers shall by rule or order allow such costs."

Sect. 34: "This Act and the several Acts specified in Schedule D. to this Act, shall, except such provisions of the same Acts respectively as are hereby repealed, be construed together as one Act." Schedule D. includes the above clauses.

James Scarlett, for the defendant. The order was made on the ground that the plaintiffs as solicitors were entitled to proceed in the High Court by virtue of the privilege of solicitors, following a case said to have been decided at chambers by Field, J.: *Cray* v. *Wray*. (1) That decision, if the case was so decided, ought not to be followed. It is true that s. 67 of the County Courts Act, 1846, only took away the privilege of being sued in the superior courts, and not that of suing: *Lewis* v. *Hance* (2); *Jones* v. *Brown* (3); and see *Borradaile* v. *Nelson* (4); but since it was so decided the Act of 1849 has been passed, which by s. 18 expressly takes away the privilege. The section in the County Courts Act, 1850 (13 & 14 Vict. c. 61, s. 11), which dealt with the costs of actions commenced in the superior courts, contained the words "nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney." The repeal of that section by 30 & 31 Vict. c. 142, s. 33, cannot revive the privilege. The Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 67, would have the effect of abolishing the privilege if it were not already taken away.

H. F. Dickens, for the plaintiffs. Sect. 5 of the Act of 1867 contains no such words as those which were contained in s. 11 of the Act of 1850; those words are repealed and not re-enacted. The question, however, really turns on s. 18 of the Act of 1849, as to which the text-writers differ; Pitt-Lewis's County Court Practice, 3rd ed., p. 23., adopts the present defendant's view, but Cordery on Solicitors, 2nd ed., pp. 205, 206, treats the privilege of suing in the High Court as still existing, and this view is

(1) 31 Sol. J. 608, from a note furnished by a correspondent.

(2) 11 Q. B. 921; 5 D. & L. 641; 17 L. J. (Q.B.) 172.

(3) 2 Ex. 329; 5 D. & L. 716; 17 L. J. (Ex.) 163.

(4) 14 C. B. 655; 23 L. J. (C.P.) 159.

supported by *Cray* v. *Wray*. (1) Sect. 18 of the Act of 1849 is so similar in substance to s. 67 of the Act of 1846 that the decisions on the earlier Act are authorities on the construction of the later.

If this contention is wrong, the costs should be allowed under s. 5 of the Act of 1867.

Scarlett replied.

WILLS, J. We are both clearly of opinion that the point which has been raised as to the privilege of solicitors must be decided in favour of the defendant. By s. 34 of the County Courts Act, 1867 (30 & 31 Vict, c. 142), the several County Courts Acts are to be construed together as one Act, and s. 5 of the same statute contains a general provision depriving the plaintiff "*in any action*" commenced in the High Court of costs, if less than a certain amount is recovered. Sect. 18 of the County Courts Act, 1849 (12 & 13 Vict. c. 101), provides that no privilege shall be allowed to any solicitor to exempt him from the provisions of that Act or the Act of 1846 (9 & 10 Vict. c. 95). As the several County Courts Acts are to be construed together as one Act, it follows from the terms of s. 18 of the Act of 1849 that no privilege is to be allowed to any solicitor to exempt him from any of the provisions of any of the Acts which are to be so construed together, and one of such provisions is that contained in s. 5 of the Act of 1867 with regard to costs.

As to the other point, we think that under the circumstances of this case there are sufficient grounds for allowing the plaintiffs' costs, and for this reason the appeal must be dismissed.

GRANTHAM, J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Blair & W. B. Girling.*

Solicitors for defendant: *Mozley & Dennison.*

P. B. H.

(1) 31 Sol. J. 608.

1888
June 12.

[IN THE COURT OF APPEAL.]

LOCKHART, APPELLANT; THE MAYOR, ALDERMEN, AND CITIZENS OF ST. ALBANS, RESPONDENTS.

Justices — Practice — Case, Application to state — Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 33 — *Summary Jurisdiction Rules*, 1886, *r.* 18.

There is no right of appeal from justices by case stated under the Summary Jurisdiction Act, 1879, s. 33, unless the directions of the rules made under that section with regard to the mode of application for a case have been observed.

Therefore in a case where no notice of application for the case in writing had been given to the justices making the order appealed against, though a notice of application in writing had been served on their clerk:—

Held, that there was no power to state a case, and that the appeal must be dismissed.

South Staffordshire Waterworks Co. v. *Stone* (19 Q. B. D. 168) approved and followed.

APPEAL from the judgment of the Queen's Bench Division (Stephen and A. L. Smith, JJ.) in favour of the respondents upon a case stated by justices under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 33.

The facts so far as material were as follows:—Upon proceedings against the appellant before justices to recover paving expenses under s. 150 of the Public Health Act, 1875, the justices made an order for payment of the sum claimed. Counsel representing the appellant thereupon orally applied for a case, which the justices intimated their willingness to grant. Within seven days from the hearing a notice in writing of application for a case by the appellant addressed to the justices who signed the order was served upon the clerk to the justices. (1)

(1) The Summary Jurisdiction Act, 1879, s. 33, provides, sub-s. 1: "Any person aggrieved . . . . may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned. . . . . Sub-s. 2. The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act."

By Summary Jurisdiction Rules, 1886, r. 18, it is provided: An application to a Court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing and a copy left with the clerk of the Court, and may be made at any time within seven clear days from the date of the proceeding to be questioned."

The Divisional Court held, on the authority of *South Staffordshire Waterworks Co.* v. *Stone* (1), that the provisions of the Summary Jurisdiction Act, 1883, and the rules thereunder, with regard to notice of application for the case, not having been complied with, they had no jurisdiction, and dismissed the appeal.

Grain, and *Reginald Kemp*, for the appellant. The provisions of the rule are directory merely: and, if not, the notice served upon the clerk to the justices was sufficient notice to the justices of the application. It never can have been intended that the appellant should be obliged to find out and serve the individual justices who formed the Court.

[LOPES, L.J. The rule requires service of a copy of the written application on the clerk of the Court. How can a written application served on the clerk only be sufficient? There would be no original in that case of which there could be a copy.]

Ex parte Curtis (2) was cited.

Lumley Smith, Q.C., and *Richard Muir*, for the respondents, were not called upon.

LORD ESHER, M.R. The question is whether the Queen's Bench Division had jurisdiction to hear this appeal. The appeal was brought under a statute which provides that the application for the case shall be made to the Court, i.e., the justices, "within such time and in such manner as may be from time to time directed by rules under this Act." Rules were made under the Act, one of which provides, in substance, that the application shall be made to the justices in writing. That rule being made, it is the same as if the provision had been enacted by the statute itself. There are a series of decisions, beginning with *Morgan* v. *Edwards* (3), which appear to be to the effect that, where a statute made with regard to a precisely similar subject-matter contained a similar direction to that contained in this rule, such direction was not directory only, but compliance therewith was a condition precedent to the jurisdiction to entertain the appeal. It would be wrong, I think, now to overrule those

(1) 19 Q. B. D. 168. (2) 3 Q. B. D. 13.

(3) 5 H. & N. 415.

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cases, and therefore I must agree with the decision of the Queen's Bench Division in *South Staffordshire Waterworks Co.* v. *Stone*. (1) If that decision is correct, it appears to be directly in point here. When this case was before the magistrates, counsel orally intimated to them the appellant's intention to apply for a case. That would not be sufficient, as the rule says the application must be in writing. I will take it that an application in writing addressed to the justices was afterwards drawn up and was served on the clerk to the justices; but it is not shewn that such application was ever brought to the attention of the justices by the parties desiring to appeal, or, so far as we know, by the clerk to the justices. The cases shew that the application in writing must be made to the Court, i.e., to the justices who were parties to the proceeding.

For these reasons it appears to me that the Court of Queen's Bench Division had no jurisdiction, and that this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. We could not do otherwise than dismiss this appeal without overruling a long series of decisions that have settled the law on this subject, which I do not think we ought to do.

LOPES, L.J. I think that, the statute providing that the application for the case shall be made in the manner directed by rules to be made, the directions given by such rules are in the nature of statutory conditions precedent to the jurisdiction of the Court to hear the appeal; and therefore that the Divisional Court was right in acting on the decision in *South Staffordshire Waterworks Co.* v. *Stone* (1), and holding that they had no jurisdiction to entertain the case.

Appeal dismissed.

Solicitors for appellant: *Lovell, Sons, & Pitfield, for Lockhart.*

Solicitors for respondents: *Bolton, Robbins, & Busk, for Blagg & Edwards.*

(1) 19 Q. B. D. 168.

E. L.

EX PARTE LEWIS.

1888
June 25, 29.

*Justices—Practice—Information not disclosing Indictable Offence—Refusal to issue Summons—Rule against Justices—*11 *&* 12 *Vict. c.* 44, *s.* 5—*Trafalgar Square—Right to occupy for Public Meeting—Commissioners of Works—Power to prohibit Meetings—*7 *&* 8 *Vict. c.* 60.

Where a Magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Court of Justice has no jurisdiction to review his decision, either as to law or as to fact, and therefore in such a case a rule, under 11 & 12 Vict. c. 44, s. 5, calling upon the Magistrate to shew cause why he should not hear and determine the application for a summons, will not be granted.

Semble, per WILLS and GRANTHAM, JJ. There is no right on the part of the public to occupy Trafalgar Square for the purpose of holding public meetings, but the Commissioners of Works and Public Buildings (in whom the care, control, management, and regulation of the square is vested by 7 & 8 Vict. c. 60, s. 2, and 14 & 15 Vict. c. 42, s. 22), have power to prohibit the holding of such meetings there.

MOTION by Mr. Edward Dillon Lewis for a rule, under 11 & 12 Vict. c. 44, s. 5 (1), calling upon James Vaughan, Esq., one of the Metropolitan Police Magistrates, to shew cause why he should not hear and determine an application for summonses against the Right Hon. Henry Matthews, Q.C., Her Majesty's Secretary of State for the Home Department, and Sir Charles Warren, the Chief Commissioner of the Metropolitan Police, for alleged offences, the nature of which sufficiently appears from the judgment of the Court.

The notices referred to in the judgment, which were signed by Sir Charles Warren, and posted in various parts of the metropolis, were in the following terms:—"Notice.—Meetings in Trafalgar Square.—In consequence of the disorderly scenes which have recently occurred in Trafalgar Square, and of the danger to the peace of the Metropolis from meetings held there,

(1) Which provides "that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule, calling upon such justice or justices, and also the party to be affected by such act, to shew cause why such act should not be done."

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and with a view to prevent such disorderly proceedings, and to preserve the peace, I, Charles Warren, the Commissioner of Police of the Metropolis, do hereby give notice, with the sanction of the Secretary of State and the concurrence of the Commissioners of Her Majesty's Works and Public Buildings, that until further intimation no public meetings will be allowed to assemble in Trafalgar Square, nor will speeches be allowed to be delivered therein; and all well-disposed persons are hereby cautioned and requested to abstain from joining or attending any such meeting or assemblage; and notice is further given that all necessary measures will be adopted to prevent any such meeting or assemblage, or the delivery of any speech, and effectually to preserve the public peace, and to suppress any attempt at the disturbance thereof. This notice is not intended to interfere with the use by the public of Trafalgar Square for all ordinary purposes, or to affect the regulations issued by me with respect to Lord Mayor's Day.

8th November, 1887."

"Notice.—Police Regulation.—In exercise of the powers vested in me under the Act 2 & 3 Vict. cap. 47, I hereby make the following regulation:—No organized procession shall be allowed to approach Trafalgar Square on Sunday, the 13th instant.

12th November, 1887."

1888. June 25. Mr. Lewis in person was heard in support of the application.

Cur. adv. vult.

1888. June 29. The judgment of the Court (Wills and Grantham, JJ.) was delivered by

WILLS, J. In this case Mr. Lewis, a solicitor, has moved for a rule calling on Mr. Vaughan, the Magistrate at Bow Street, to shew cause why he should not hear and determine an application for summonses against the Right Hon. Henry Matthews, Her Majesty's Secretary of State for the Home Department, and Sir Charles Warren, the Chief Commissioner of the Metropolitan Police, for indictable offences, which he alleges they have committed, and says appear from certain informations, nine in number,

sworn before Mr. Vaughan, and exhibited to an affidavit of the applicant, Mr. Lewis.

We asked Mr. Lewis what specific offences he had alleged before Mr. Vaughan. His answer was that Mr. Vaughan, having read the informations, refused summonses before he had specified the charges. We asked, therefore, for what offences Mr. Lewis now wishes to obtain summonses. We give the answer in his own words:—1. "Conspiring by unlawful violence and other unlawful means to prevent divers of Her Majesty's subjects from exercising their constitutional and lawful rights." 2. "Conspiring to endanger the public safety and peace, and to injure, annoy, and disturb the public in the enjoyment of their civil rights." 3. "A nuisance at common law, stopping the processions, preventing by force the lawful use of the thoroughfare, and the enjoyment of public rights and privileges, causing inconvenience and annoyance to Her Majesty's subjects in reference to their personal safety and comfort." 4. "Conspiring to inflict grievous bodily harm by using violence in excess of what the occasion lawfully required."

We observe in passing that as to charges 1 and 2 they answer themselves. No conviction for an offence so described could possibly be maintained. From charges 3 and 4, as formulated, offences known to the law, though inartificially described, may, by the omission of words, be collected.

It appears from Mr. Lewis's affidavit that he was himself the prosecutor before Mr. Vaughan, and not acting in any way as a solicitor for any one else. It is of course only in the character of a person putting in force the criminal law on his own account that he can be heard on this application.

It appears that upon applications of this kind it has been the practice to allow the prosecutor to make the motion in person, notwithstanding the well-known rule in respect to mandamus, for which the present proceeding is a substitute—that the application can only be made by counsel. Our experience in this case makes us almost doubt the wisdom of the relaxation of the old rule, as our time was taken up for two hours and a half by arguments founded largely on legal solecisms of the wildest kind; as for instance on the assertion that the owner of land

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could make an effectual dedication of it to the public for any lawful object or use; that fairs and markets owe their origin to dedication; that a resolution of one House of Parliament was a declaration of the law as binding as the decision of one of the Superior Courts, and that the law under which the Judges hold their appointments *quamdiu se bene gesserint* instead of *durante bene placito*—a cardinal provision of the Act of Settlement, 12 & 13 Wm. 3, c. 2—rests upon no more solid foundation than a resolution of the House of Commons. From arguments based upon such notions of law and history the Court can derive no assistance, whilst they necessarily involve a great waste of time.

There are, in our opinion, more answers than one to the application.

In the first place, it comes very late. The public notices issued by the Home Secretary and Sir Charles Warren, upon which this complaint was based, were published in November; Mr. Vaughan's refusal of the summonses was given on the 15th of February. The motion has been attempted once or twice before on materials presenting some fatal defect, and it was only on June 25—more than four months afterwards—that the application was at length in a condition to be heard. When it was heard Mr. Lewis was uncertain what he wanted, and asked for an order amongst other things to Mr. Vaughan to hear an application for summonses against officers of the police force, whom his affidavit shews that he had never intended to charge before Mr. Vaughan. Such motions must always be made with reasonable promptitude. We can find in the affidavits no explanation of the delay, and it seems to us altogether unreasonable.

But passing by this objection, and coming to matters of more substance, we think it clear, from a perusal of the shorthand notes of Mr. Vaughan's statement when refusing the summonses, that he had considered the informations, and was of opinion that they disclosed no legal offence. The reference he made to Mr. Justice Charles's summing-up at the Old Bailey in *Reg.* v. *Graham and Burns* (1), shews clearly that he had not only read the informations—which he said he had done—but had applied his

(1) Central Criminal Court, 16th, 17th and 18th January, 1888; 4 Times Law Rep. 212.

mind to the question whether any legal offence on the parts of Mr. Matthews and Sir Charles Warren was disclosed, and that, applying to the facts the principles laid down by our brother Charles as to the right of occupying Trafalgar Square for the purposes of public meetings, he was of opinion that they shewed no legal offence. No one can doubt that Mr. Justice Charles's ruling had a material bearing upon the case before Mr. Vaughan. It is true that he said it was useless for him to hear Mr. Lewis, as he understood that Mr. Lewis wished to convince him that Mr. Justice Charles had laid down bad law, whereas he should feel himself bound by that statement of the law, whatever Mr. Lewis might say. Mr. Lewis did not ask to be allowed to distinguish that case. "You may say it is bad law," said the Magistrate, and it is clear that that was what Mr. Lewis was anxious to contend. The Magistrate was right in saying that it was in vain for him to hear an argument upon that point. He added, "You can have your application to grant summonses considered by the Superior Court, and I shall then be content to grant them." But this was a mistake on the part of the learned Magistrate, for nothing can be clearer or more settled than that if the justices have really and bonâ fide exercised their discretion, and brought their minds to bear upon the question whether they ought to grant the summons or not, this Court is no Court of Appeal from the justices, and has no jurisdiction to compel them to exercise their judgment in a particular way: *Reg.* v. *Adamson* (1); *Reg.* v. *Ingham* (2).

Reg. v. *Adamson* (1) was relied upon by Mr. Lewis, but there the Court came to the conclusion that the justices had refused the summonses, not because they had really exercised their judgment upon the facts and the law, "but from a consideration apart from the facts, which they ought not to have taken into account." (3) *Ex parte Wason* (4) was also relied upon. "If the matter brought before the Magistrate," said Cockburn, L.C.J., "had been matter cognizable by the criminal law, and upon which an indictment might have been preferred, the Magistrate would have had no discretion, but would have been bound to

(1) 1 Q. B. D. 201.
(2) 14 Q. B. 396.
(3) 1 Q. B. D. at p. 207, per Field, J.
(4) Law Rep. 4 Q. B. 573.

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proceed as directed by the statute." (1) He is speaking of a totally different matter; and with reference to the Vexatious Indictments Act, 22 & 23 Vict. c. 17, s. 2, which provides that where any charge shall be made before one or more justices that any person has committed one of the specified offences, and he shall refuse to commit, he shall, upon the application of the prosecutor, take his recognisance to prosecute. The language of the learned Lord Chief Justice is perfectly accurate with reference to that enactment, but he never meant to say that the Magistrate had, when a complaint was laid before him, no judicial discretion to exercise as to whether a legal offence had been made out, or that if he had exercised his judgment wrongly, either as to the law or the facts, the Superior Court would sit in appeal from his decision. "I take the law," says, in substance, the learned Magistrate in this case, "to be as laid down by Mr. Justice Charles, and if that be the law I think that the informations disclose no offence." If that is not exercising jurisdiction, we are at a loss to say what is so; and we have no jurisdiction in such a case to correct his law, even if wrong, and to direct him to alter his decision.

This being so, a decision by us of the other questions raised by Mr. Lewis is beyond our competence.

We must not, however, allow our silence to be construed into anything like acquiescence in the views put forward by Mr. Lewis.

A great deal was said about the right of public meeting—unnecessarily—inasmuch as it is a right which has long passed out of the region of discussion or doubt. As to the suggested right of holding public meetings in Trafalgar Square—which is, in other words, a suggestion of a right on the part of as many of her Majesty's subjects as may be so disposed to occupy Trafalgar Square, whenever and so often as they may wish, for a public meeting, or possibly for more than one public meeting, to be held by persons of conflicting views and sympathies, (for the right, if it exist, must be common to every member of the public), all we wish to say is, that if the right is to be made out it must be established by materials and considerations very different from

(1) Law Rep. 4 Q. B. at pp. 574, 575.

any that were laid before us. We were informed by Mr. Lewis that there was no statute conferring or recognising such rights, although Trafalgar Square owes its very origin and existence to legislation later than the beginning of this century. He alleged that they rested upon "dedication." It is, however, a species of dedication at present unknown to the law, and of which there is no trace in our law books. The only "dedication" in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a "right for all her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance."

A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it. It was urged that the right of public meeting, and the right of occupying any unoccupied land or highway that might seem appropriate to those of her Majesty's subjects who wish to meet there, were, if not synonymous, at least correlative. We fail to appreciate the argument, nor are we at all impressed with the serious consequences which it was said would follow from a contrary view. There has been no difficulty experienced in the past, and we anticipate none in the future, when the only and legitimate object is public discussion, and no ulterior and injurious results are likely to happen. Things are done every day, in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right.

Upon the materials brought before us by Mr. Lewis it would appear that Trafalgar Square as an open space owes its existence to a modern Act of Parliament, 53 Geo. 3, c. 121, which defined, by reference to a plan, its limits and the rights of way over it, expressly extinguishing others not shewn upon the plan. It appears from the recital of 7 & 8 Vict. c. 60, to have been vested in her Majesty, her heirs and successors. By the terms of that

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Act it was vested in her Majesty, her heirs and successors, as part and parcel of the hereditary possessions and revenues of her Majesty in right of her Crown, within the ordering and survey of the Court of Exchequer, and in the Commissioners of Woods and Forests was vested the care, control, management, and regulation of the square. These powers are now vested in the Commissioners of her Majesty's Works and Buildings. (1) Trafalgar Square, therefore, is completely regulated by Act of Parliament, and whatever rights exist must be found in the statute, if at all. The right of public meeting is not among them. The right of control appears to be unqualified except by what else is to be found in the Acts, and must therefore cover the right of saying under what circumstances, and for what purposes, other than the public rights of passage given by the Acts, it shall be used; and whilst we abstain from pronouncing a judgment upon that which we think it is not under the circumstances for us to decide, we think it only right to say that so far as Mr. Lewis's arguments are concerned, they have not only failed to convince us that there is any right to hold public meetings in Trafalgar Square, but have gone far to establish that the Commissioners of Works have a right to say whether or not it shall be so used.

We think it right further, in justice to the public servants whose conduct has been called in question by Mr. Lewis, to say that he has in our opinion shewn no grounds whatever for charging them, or either of them, with a criminal conspiracy, or with criminal misconduct of any kind, and under these circumstances in our opinion this application ought to be refused.

Rule refused.

(1) By 14 & 15 Vict. c. 42, s. 22.

P. B. H.

WINDHAM *v.* BAINTON AND OTHERS. 1888 *June* 8.

Practice—Costs—Taxation—Evidence procured before Trial—Discontinuance—Order LXV., *r.* 27, *sub-r.* 9.

By Order LXV., r. 27, special allowances in respect of (sub-rule 9) "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence," shall apply to all taxations in the Supreme Court:—

Held, that under this rule a master had a discretion to allow charges and expenses properly incurred by the defendant in procuring evidence where the plaintiff, having given no notice of trial, subsequently discontinued the action.

ACTION against commissioners appointed under the Beverley and Barmston Drainage Acts, 1798 and 1880, to recover damages for injury to the plaintiff's reversion in certain lands by reason of the defendants having negligently and improperly dredged and deepened the river Hull.

The plaintiff's writ was issued on April 15, 1887. The statement of claim was delivered on June 30, and the statement of defence on August 12. On November 15 the plaintiff gave notice of discontinuance. No notice of trial had been given to the defendants. In July and August the defendants, in order to prepare their case, instructed engineers and surveyors to examine and report upon the state and condition of the river banks, and to make plans thereof. After the plaintiff had discontinued the action, the defendants carried in their costs for taxation before a master, and included in their bill the costs and expenses incurred in respect of obtaining the evidence of the engineers and surveyors.

The master disallowed those costs and expenses on the ground that in practice they were never allowed as between party and party at that stage of the case. He was of opinion that such costs might be costs as between solicitor and client, and that if the case had gone on, and notice of trial had been given, they would have been allowed either as instructions for brief, or as qualifying fees for the witnesses.

Upon a summons to review the taxation, Cave, J., at chambers, referred the matter to the Court.

Henry Sutton, for the defendants. The master, if satisfied that the costs in question were properly incurred in procuring

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evidence, ought to have exercised his discretion by allowing them. It is conceded that prior to 1875 such costs, if incurred before notice of trial, were not allowed; but the old practice in that respect is abrogated by Order LXV., r. 27, sub-r. 9, which is inconsistent with it; and by sub-rule 37 the practice with respect to the taxation of costs, existing prior to the commencement of the principal Act, shall be applicable only in so far as it is not inconsistent with the principal Act and those rules. The special allowances dealt with by sub-rule 9 are discretionary, and sub-rule 38 points out the considerations by which the exercise of the discretion must be influenced. The practice in the Queen's Bench Division ought to be assimilated to that which prevails in the Chancery Division, where the taxing officer exercises a discretion with respect to the allowance of similar costs.

[He cited *Harrison* v. *Leutner* (1); *Mackley* v. *Chillingworth* (2); *Turnbull* v. *Janson*. (3)]

R. D. Acland, for the plaintiff. The master's view was right. An unsuccessful litigant is not liable to pay all his opponent's costs of preparing for trial. He is only liable to pay the costs reasonably incurred by the opponent in preparing for trial after notice of trial has been given: *Curtis* v. *Platt*. (4) The new rules did not intend to alter the old practice in this respect. "Evidence" in Order XLV., r. 27, sub-r. 9, means evidence which is afterwards given at the trial. All the cases cited for the defendants went to trial, and the evidence was given, so that they do not apply. The reports of the surveyors and engineers in the present case were procured by way of mere preparation, and no notice of trial having been given, the master had no discretion to allow the costs.

MANISTY, J. This is an application for a review of the taxation of a bill of costs. The real question is whether or not the master has a discretionary power, since the new rules, to allow costs and expenses incurred in procuring evidence before notice of trial has been given, the former practice being that, as between party and party, such costs were never allowed at this

(1) 16 Ch. D. 559.
(2) 2 C. P. D. 273.
(3) 3 C. P. D. 264.
(4) 33 L. J. (C.P.) 255.

stage of the case. Now as one of those who assisted in drawing up the new rules, I can say that the intention was to give the masters a wider discretion than they had formerly. Has that intention been carried out? The question turns upon Order LXV., r. 27, sub-r. 9; for I do not think that sub-rule 3 has any bearing on the matter. Sub-rule 9 provides that "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence . . . are to be allowed." Are these, then, charges and expenses properly incurred in procuring evidence? It was contended that the words "as to evidence" in sub-rule 9 referred only to the evidence of witnesses actually called at the trial. To my mind no such limited meaning is to be given to the words of that rule. The evidence in question here was that of surveyors and engineers, but it was such evidence as would, if the action had gone on, have been necessary "having regard to the nature and importance of the case," which element, the master, by sub-rule 38, must take into consideration in exercising his discretion. There is nothing in sub-rule 9 limiting its operation to evidence procured after notice of trial has been given. No time is specified in the sub-rule, and in my opinion the master had a discretion to allow or disallow the costs of procuring such evidence, even if such costs were incurred before delivery of the statement of defence, so long as they were properly incurred in order to support the case set up by the defence. I think that the authorities cited for the defendants are strongly in favour of the view I take of the meaning of sub-rule 9, though they are, of course, subject to the observation made upon them that they were all cases which went to trial. If the costs and expenses of procuring evidence were properly and reasonably incurred, I think it makes no difference that they were incurred before notice of trial.

STEPHEN, J. I am of the same opinion. Before the year 1875, and for some time afterwards, no costs or expenses were allowed in respect of procuring evidence before notice of trial. The question here is whether the maintenance of the old rule is consistent with sub-rule 9. That sub-rule does not say that "evidence" shall mean evidence actually given at the trial, and

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I do not think it can mean that. The costs and expenses to be allowed are those properly incurred in procuring evidence. Here the evidence procured could never have been given as the trial was discontinued, but that fact, to my mind, makes no difference with respect to the master's discretion to allow them. I decline to adopt the very narrow construction of the sub-rule which has been suggested. The case must, therefore, go back to the master.

Order accordingly.

Solicitors for the plaintiff: *Lawrence, Graham, & Long.*
Solicitors for the defendant: *Oldham & Clabburn.*

W. A.

June 6, 11.

[IN THE COURT OF APPEAL.]

DAVYS *v.* RICHARDSON.

Practice—Payment into Court—Defence setting up Tender—Denial of Liability—Payment out of Court to Plaintiff's Solicitor—Liability of Solicitor to refund—Order XXII. *rr.* 5, 6.

In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice; or, in the alternative, three months; that before action the defendant made tender of three months' salary, which the plaintiff refused; that the defendant had paid the amount into court, and that it was enough to satisfy the plaintiff's claim. The request for lodgment in court contained a statement that the money was paid in with a defence setting up tender.

The plaintiff's solicitor, without obtaining an order, but on the written authority of the plaintiff, took the money out of court, and the plaintiff proceeded with the action. At the trial judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary. The defendant applied for an order against the solicitor to refund so much of the money taken out of court as represented the difference between one month's and three months' salary.

The solicitor had acted bonâ fide in taking the money out of court, and had paid it over to the plaintiff before the application to make him refund it was made:—

Held, that, although the plaintiff ought not to have had the money out of court, because a defence of tender of the sum paid in could not be pleaded to a claim for unliquidated damages, yet under the circumstances the solicitor ought not to be ordered to refund it.

APPEAL by the plaintiff's solicitor in an action for wrongful dismissal against the decision of the Queen's Bench Division

ordering the solicitor to refund to the defendant a sum of money taken out of court (reported 20 Q. B. D. 722).

The facts sufficiently appear from the head-note to this report and are fully stated in the judgments of the Court of Appeal.

Lumley Smith, *Q.C.*, and *Horace Browne*, for the appellants, argued that the defendant having paid the money into court with a defence setting up tender of the sum paid, r. 5 of Order XXII. applied, so that the plaintiff was entitled to take the money out of court without an order; that the defendant having misled the plaintiff by his defence of tender was estopped from averring that the plaintiff was wrong in acting as he had; and that at any rate no order to repay the money ought to be made against the solicitor, who had acted bonâ fide in taking it out of court, and had paid it over to his client before the application to have it refunded was made.

[They cited *Fewings* v. *Tisdal* (1); *Birkinshaw* v. *Nicholls* (2).]

R. Henn Collins, *Q.C.*, and *Morton Smith*, for the respondent, being asked to argue the question whether, under the circumstances, an order for the repayment of the money paid into court could be made against the solicitor, contended that the Queen's Bench Division had a discretion to order the solicitor to repay it, and that the Court of Appeal ought not to interfere with the exercise of that discretion.

Cur. adv. vult.

1888. June 11. LINDLEY, L.J. This is an appeal by the plaintiff's solicitor from an order of the Queen's Bench Division directing him to pay over to the defendant part of a sum of 163*l.* which had been paid into court. The action was brought partly to recover money due from the defendant to the plaintiff on the balance of an account between them, and partly to recover damages for wrongful dismissal. The defendant in his statement of defence in substance admitted liability in respect of the sum claimed for balance of account, and he also admitted liability for one month's salary in respect of the wrongful dismissal. As to that he pleaded that the plaintiff was only entitled

(1) 1 Ex. 295.

(2) 3 App. Cas. 1004. Judgment of Lord Blackburn, at p. 1026.

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to one month's notice, or, in the alternative, to not more than three months' notice; and he pleaded further as to the whole statement of claim that "the defendant made tender before action of 163*l.* (according to the particulars below) which the plaintiff refused, and the defendant has paid the said amount of 163*l.* into court, and says it is enough to satisfy the plaintiff's claim." The particulars given by the defendant shew that 62*l.* 10*s.* was paid in in respect of three months' salary in lieu of notice. The money was paid in upon a lodgment form, under Order XXII., r. 5 or r. 6, which form stated that the money was paid in with a defence setting up tender. The subsequent facts appear from the affidavit made by the solicitor which has been used in this appeal. He applied for payment out of court of the sum of 163*l.*, which was a proper step to take if the money had been paid into court with a plea of tender. The application was made upon the written authority of the plaintiff to the Bank of England to pay the money to the solicitor, and he received it a few days afterwards. He applied that money by retaining, with the plaintiff's authority, a sufficient sum to cover his costs out of pocket, and by handing over the remainder to the plaintiff. At the trial the judge acted upon evidence that one month's notice was sufficient, and gave judgment for the defendant. The defendant, therefore, the plaintiff having got the equivalent of three months' notice, sought to get back the difference—amounting to about 40*l.*—between one month's and three months' salary. Two summonses—against the plaintiff and his solicitor respectively—were taken out with that object, and Pollock, B., at chambers, refused to make any order upon them on the ground that the money had been paid in with a plea of tender. On appeal, the Divisional Court made an order that the 40*l.* should be refunded to the defendant. The plaintiff was then dead, and an order was made that the solicitor should refund the money, which was not then in his hands. The appeal here is against that order upon the solicitor. The Court below took the view that in legal effect the payment into court was not made with a plea of tender but with a defence denying liability, and that, notwithstanding the terms of the defence and the previous tender, there could not be a plea of tender because the claim in respect

of which the payment into court had been made was a claim for unliquidated damages. Now, as to that, I am of opinion that the law remains as it was before the Judicature Acts, and that you cannot now, as you could not then, set up a defence of tender in answer to a claim for unliquidated damages. But the Court below thought that, the money having been improperly taken out of court, an order might be made upon the solicitor to refund it. I confess I think, when the circumstances with respect to the plea of tender and what followed are looked at, that the Divisional Court took a wrong view, though it is true they had not before them, as we have had, the affidavit of the solicitor. Let us see what was done: the defendant put in a statement of defence which, to say the least, was ambiguous and calculated —I do not say intentionally—to mislead. In fact it did mislead a person acting with perfect honesty, and induced him to apply for payment of the money out of court. Where a defence, ambiguous and misleading, is put in and is acted upon, can the defendant say his opponent is wrong in doing that which he has himself invited him to do? Here the defendant by paying money into court with a plea of tender invited his opponent to act upon it, and take out the sum so paid in. It does not follow that the person who, under such circumstances, has taken the money out of court is entitled to retain it. But here the solicitor says, "I took the money out of court as solicitor and paid it over to my client. Why should I be called upon to repay it?" The question whether the client is entitled to retain the money is wholly different from the question whether the solicitor, acting properly and bonâ fide paying over the money to his principal, ought to be made to repay it. I think that the order made by the Divisional Court was wrong. It is said that the learned judges had a discretion, and we ought not to interfere with the exercise of it. I think this is not a question of discretion. The question is whether or not an order such as this ought to be made against a man who acted with bona fides in taking the money out of court, as he was invited to do by the plea of tender, and has paid it away to his client. I think that he ought not to be ordered to refund it. This appeal must, therefore, be allowed.

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LOPES, L.J. I am of the same opinion. The statement of defence is informal and calculated to mislead. Any solicitor might reasonably doubt whether rule 5 or rule 6 of Order XXII. applied. I think that the true reading of the pleading in question is that it is a payment into court with a denial of liability under rule 6. The plaintiff claims a year's salary. The defence denies that the plaintiff is entitled to more than one month's salary, and alleges in the alternative that he is entitled only to three months' salary. This is what is contemplated by the preamble of rule 6—namely, a denial of the liability of the defendants in respect of the claim or cause of action in satisfaction of which the payment into court has been made. But the rule proceeds (*c.*): "If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of the Court or a judge, and shall not be paid out of court except in pursuance of an order." That is exactly what has happened. The plaintiff has not accepted (as he might) the sum paid into court in satisfaction, but has proceeded with his action, and is not entitled to have the money, or any part of it, paid out of court without an order, and having recovered less than the amount paid in, is only entitled under an order to so much as he has recovered, the balance being repayable to the defendant.

I entirely agree with the view taken by the Divisional Court with regard to the words, "a defence setting up a tender of the sum paid," in rule 5 of Order XXII. That rule refers to the old plea of tender, which could not be pleaded to an action for unliquidated damages, such as is an action for wrongful dismissal. But the Divisional Court has ordered repayment by the solicitor. I doubt if the facts were fully brought to the notice of the judges. The money was bonâ fide taken out of court by the plaintiff's solicitor, who was misled by the defendant's informal pleading, and subsequently, before his attention had been drawn to the mistake, the money was bonâ fide paid over by him to his client. There was no misconduct of any kind by the solicitor, and I do

not think, under such circumstances, the Court had power to order him to refund it.

Appeal allowed.

Solicitor for plaintiff: *J. G. Clabburn.*

Solicitors for defendant: *Ross & Douglas Norman.*

W. A.

[IN THE COURT OF APPEAL.]

June 11, 12.

BUTLER *v.* THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

Railway Company—Passenger—Ticket, failure to produce—Condition incorporated by Ticket—Forcible Removal from Carriage—Assault—Licence—Easement.

The plaintiff was a passenger by the defendants' railway. The ticket issued to him incorporated by reference certain conditions published in the defendants' time-tables, one of which was that every passenger should shew and deliver up his ticket to any duly authorized servant of the company, when required to do so for any purpose, and any passenger travelling without a ticket, or failing, or refusing to shew or deliver up such ticket as aforesaid, should be required to pay the fare from the station whence the train originally started. The plaintiff having lost the ticket was unable to produce it when required to do so during the journey by one of the defendants' servants. The plaintiff was thereupon required to pay the fare from the station whence the train had started, and, on his declining to do so, was forcibly removed by the defendants' servants from the carriage in which he was travelling, no more force, however, being used than was necessary for his removal. He thereupon sued the defendants for assault:—

Held, that the contract between the plaintiff and the defendants did not by implication authorize the defendants to remove the plaintiff from the carriage on his failing to produce a ticket and refusing to pay the fare as provided by the condition; that the defendants were not justified in so removing him; and that the action was therefore maintainable.

APPEAL from the judgment of Manisty, J., at the trial of an action for assault.

The facts were, so far as material, as follows:—The plaintiff was a passenger by the defendants' railway. He had taken a return ticket for a journey by an excursion train from Sheffield to Manchester and back. The ticket issued to him had upon it the words "subject to the conditions contained in the company's time-tables and advertisements." In the time-tables issued by

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the defendants were published certain by-laws and regulations headed "By-laws and regulations made by the company with the approval of the Board of Trade for regulating the travelling upon and using the railways belonging to the said company," and which were stated to be made under the seal of the company and approved by the Board of Trade. One of such regulations was to the following effect: "No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall shew and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose; any passenger travelling without a ticket or failing or refusing to shew or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey." Certain of the other by-laws and regulations expressly provided for the removal of passengers from the company's carriages and premises, e.g., those with regard to persons intoxicated or using obscene and abusive language, or smoking in carriages not specially provided for that purpose.

The plaintiff gave up the outward half of his ticket at Manchester, and on his return journey was required at Wadsley Bridge station, a mile out of Sheffield, to produce his ticket, but was unable to do so, having lost the return-half of the ticket. The ticket collector required him to pay the ordinary third-class fare from Manchester, which he declined to do. The company's servants refused to allow him to proceed without paying such fare, although he offered his name and address; and, as he would not alight from the carriage, he was removed therefrom by force. He thereupon sued the company for assault. The jury found that no more force had been used in removing him than was necessary for the purpose, and assessed the damages at 25*l*. It was agreed that the learned judge should decide all questions of fact other than the questions as to whether there had been an excess of force used and as to the amount of the damages. The learned judge gave judgment for the defendants, holding it to be an implied term of the contract that, if the passenger failed to

produce his ticket, his right to be carried ceased, and that he might be removed from the carriage.

Waddy, Q.C., and *Lawson Walton*, for the plaintiff. The fact that a passenger has lost his ticket, which is merely a receipt for the fare, does not put an end to the contract of carriage entered into by the company or entitle the company to turn him out of the carriage in which he lawfully is by virtue of the contract. There is no ground for the implication that there was an agreement on the plaintiff's part to the effect that the company might remove him on his failing to produce his ticket. The regulations contained in the company's time-tables do not import any such agreement, and, if they did, such a condition being unreasonable, the passenger would not be bound by it.

Lockwood, Q.C., and *Cyril Dodd*, for the defendants. In order to arrive at the reasonable interpretation of the contract between the railway company and the passenger, regard must be had to the conditions under which the company carry on their business and the common knowledge of railway passengers of the practice as to tickets. It is obviously impossible for the company to ascertain whether the passenger is entitled to be carried in the absence of a ticket; and therefore it is a very reasonable condition, as between the company and the passenger, that the production of the ticket is to be the conclusive test as to his right to be carried. The regulations of the company are incorporated by the ticket, but, even apart from those regulations, it is submitted that the reasonable implication would be that the contract is that the passenger shall produce his ticket or pay the fare, and, if he fails to do so, he shall have no further right to be carried. The contract only entitles the plaintiff to be on the company's premises on certain conditions. The purpose for which he is on the company's premises and in their carriage having come to an end, he has ceased to be lawfully there, and the company are entitled to remove him. It is clear that it is a necessary implication that, if the passenger could not produce a ticket, the company's servants might forcibly prevent him from going on the platform or into a carriage, even if he had paid his fare; if so, it seems to follow that it is equally a necessary implication that they

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might remove him from the carriage on failure to produce a ticket.

[They cited on this point *Saunders* v. *South-Eastern Ry. Co.* (1); *Shelton* v. *Lake Shore Ry. Co.* (2)]

Secondly, it might be a breach of contract to remove the plaintiff from the carriage, but the plaintiff had no easement or right to be on the company's premises against their will in the sense that it would be an assault to remove him. There was a licence to be on land coupled with a contract to carry, but the licence not being under seal was revocable, though it might be a breach of contract to revoke it: *Wood* v. *Leadbitter*. (3)

Waddy, Q.C., was not called upon to reply.

LORD ESHER, M.R. In this case the plaintiff, who was a passenger by the defendants' railway, had paid for a ticket, but had lost it. At a certain stage of the journey he was asked to produce his ticket, and, not being able to do so, was told that he must pay the ordinary third class fare from Manchester to Sheffield. He refused to do so; and thereupon the defendants' servants assumed the power of pulling the plaintiff forcibly out of the railway carriage in which he was travelling. The plaintiff brings an action of assault against the defendants for this act of their servants; and the defendants assert that they were justified in removing the plaintiff from their carriage by force, using no more force than was necessary for the purpose of overcoming his resistance. The defendants put it that the plaintiff was unlawfully upon their premises, and it is admitted that the allegation that he was so is material to their defence. The question, therefore, is whether it is true that he was unlawfully on their premises. I do not think that is made out. What is the nature of the relation between the plaintiff and the defendants? It is, as it appears to me, a contractual relation. It was alleged that the contract was for a right to go on the defendants' land in the nature of an easement, but that, there being no grant of an easement under seal, there was only a licence given by the defendants to go on their premises, which they could revoke. All I

(1) 5 Q. B. D. 456. (2) 29 Ohio, 214.
(3) 13 M. & W. 838, 845.

will say with regard to that contention is that, though it may have been quite right for the defendants' counsel to suggest the point, it seems to me when considered to be contrary to good sense. To say that a passenger by railway from London to Liverpool is to have an easement all over the line between those places seems to me really ridiculous: and the absurdity of such a view of the case becomes greater when we remember that companies often contract to convey passengers over the lines of other companies. It seems to me, therefore, that the considerations upon which the case of *Wood* v. *Leadbitter* (1) turned are not applicable in this case. The contract between the plaintiff and the defendants really is that, on his paying the fare for the journey, they will carry him in their carriage on the journey, for which he has so paid the fare, using due care for his safety while so doing. That contract may be subject to conditions by reason of notice given to that effect upon the ticket incorporating such conditions. In this case it is said that the ticket referred to certain conditions and thereby incorporated them into the contract. The only conditions which can be alleged to be so incorporated into this contract are the by-laws and regulations which the company made in pursuance of the authority given them for that purpose by statute. They can only make by-laws and regulations in pursuance of their statutory powers, and accordingly we find that they assume to make certain by-laws and regulations as required under the Railways Clauses Consolidation Act, 1845, viz., under the seal of the company and with the approval of the Board of Trade, and such regulations are the only conditions which can be looked on as incorporated by reference by this ticket. One of such by-laws and regulations provides that, "Every passenger shall shew and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose: and any passenger travelling without a ticket, or failing or refusing to shew or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." I do not think it is necessary for the purposes of this case to discuss the question whether that is a valid or reason-

(1) 13 M. & W. 838.

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able regulation, or how far the plaintiff would be bound by it if unreasonable. It would seem, if the decision in *Saunders* v. *South Eastern Ry. Co.* (1) be correct, not to be reasonable. Whenever it becomes necessary we must deal with that question, but I think we may for the present purpose assume that the condition is reasonable. The effect of it is that the passenger is under an obligation to shew his ticket, when asked to do so, and, if he fails to do so, a certain consequence is to follow, viz., that he must pay the fare from the station whence the train started. But suppose that he refuses to do so, he no doubt breaks his contract; but does it result that the company's servants may lay hands on him and remove him from the carriage? I do not think that it does. The remedy is by proceeding against him for the amount of the fare he refuses to pay. Where is there any contract by which he has agreed that, if he fails to shew a ticket or to pay the fare mentioned in the regulation, the company may lay hands on him and put him out of the carriage by force? No one has any right to lay hands forcibly on a man in the absence of some legal authority to do so or some agreement to that effect. It is argued that such a right on the part of the company must be implied, but no Court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties, and I cannot agree with the learned judge in the Court below in holding that such a term should be implied. For these reasons I think his decision was wrong, and that the appeal should be allowed and judgment entered for the plaintiff.

LINDLEY, L.J. I am of the same opinion. The question raised by this case is one of great importance both to the company and the passenger. One knows that railway companies may be placed in great difficulty by the unscrupulous attempts of fraudulent persons to cheat them; and I do not desire to express any opinion one way or the other on the question whether or not some condition might be made, which, if properly worded, would justify the company in future in taking the course they claimed to take in the present case. There does not seem to me to be any by-law

(1) 5 Q. B. D. 456.

or regulation in this case which authorized the company to remove from their carriage a passenger who failed to produce his ticket. That consideration seems to me to be the key to the whole case. How can the company justify laying hands on the plaintiff? The plaintiff had taken his ticket, and the effect was that there was a contract by the company to carry him to Manchester and back. There is no authority as yet to the effect that such a contract of carriage is a contract for an interest in land. It seems to me to be a totally different thing from a contract for an interest in land; and it seems to me absurd to treat the case as one of a revocable licence. It is a case of a contract for carriage. The doctrine of *Wood* v. *Leadbitter* (1) does not appear to me to be at all applicable to the case of such a contract. Supposing that the contract of carriage involved a contract for production of the ticket or payment of another fare, and the plaintiff broke that part of the contract, does it follow as a matter of law that the defendants could turn him out of the carriage? The remedy is to take proceedings for the breach of contract on his part. It is argued that having broken the contract he was no longer lawfully on the defendants' premises. I do not see that that consequence follows. It does not appear to me that the contract between the plaintiff and the defendants was cancelled by reason of the plaintiff's breach of contract. In my opinion the defendants failed to shew that the plaintiff was unlawfully upon their premises, and therefore they had no right to remove him therefrom by force. For these reasons I agree that the appeal should be allowed.

LOPES, L.J. It is somewhat extraordinary that there should be no authority on such an important point as that raised in the present case. To my mind the case is very clear. In the first place, it is to be observed that there is no by-law or regulation which can be relied on as protecting the defendants in respect of what their servants did in this case. Whether any regulation could be framed which would do so, I doubt; but it is unnecessary to express any opinion as to that, because there is no such by-law or regulation in this case. That being so, the question

(1) 13 M. & W. 838.

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is whether the company's servants were justified in the absence of any such by-law or regulation in laying hands on the plaintiff as they did. The plaintiff had admittedly properly taken his ticket for the journey from Sheffield to Manchester and back, and had paid the full fare for the journey, and admittedly he had lost his ticket accidentally. The effect is, to my mind, that he was lawfully in the defendants' carriage. It seems to me sufficient to state so much to shew that the defendants were not justified in assaulting him as they did. It is argued that there was a breach by him of an implied contract. I find it difficult to understand what the nature of the suggested implication could be, unless it were to the effect that he agreed or consented that, if he lost his ticket, the company should be authorized to lay hands on him and remove him from their carriage. I see no evidence whatever of any contract of that kind. If there were any breach of contract by him, it seems to me clear that they were not entitled to lay hands on him, but that their remedy would be by proceeding for the amount of the fare which he refused to pay. The case of *Wood* v. *Leadbitter* (1) was relied upon by the counsel for the defendants; but I do not think that the principles enunciated in that case have any application to the present. The question there was as to the right to go upon land. The present case is one of a contract to carry with reasonable care, and has nothing to do with land or any easement over or licence to go upon land. It does not appear to me that any question as to the revocability or otherwise of a licence arises. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Hickin & Fox, for Clegg & Sons.*

Solicitors for defendants: *Cunliffes & Davenport, for R. Lingard Monk.*

(1) 13 M. & W. 838.

E. L.

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* GREENWOOD & SONS.

1888
April 25.

Railway Company—Carriage of Goods—Action for Charges—Defence of Unreasonableness—Overpayments in respect of Unreasonable Charges—Set-off —Counter-claim—Railway and Canal Traffic Act, 1854 (17 *&* 18 *Vict. c.* 31), *ss.* 2, 6.

It is no defence to an action by a railway company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854, nor can the defendant in such an action set off, or recover by counter-claim, over-payments in respect of previous charges which were unreasonable within that section.

ACTION to recover money alleged to be due from the defendants for the carriage of their goods on the plaintiffs' railway.

The defence which was relied upon at the trial before Cave, J. at Liverpool, without a jury, was that the charges sought to be recovered, and certain other similar charges, which had previously been paid by the defendants to the plaintiffs, were unreasonable, so as to subject the defendants to undue prejudice or disadvantage, within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the defendants claimed a set-off, and also counter-claimed, in respect of the alleged overpayments on previous occasions.

The material facts sufficiently appear from the judgment.

Littler, Q.C., Bigham, Q.C., and *J. B. Edge,* for the plaintiffs.
R. Henn Collins, Q.C., and *C. A. Russell,* for the defendants.

Cur. adv. vult.

April 25. CAVE, J. delivered judgment as follows:—This is an action to recover the sum of 247*l.* 16*s.* 7*d.*, for the carriage of the defendants' goods by the plaintiffs, and was tried before me on the Northern Circuit.

At the hearing two points were raised. The first was whether there was such an agreement by the defendants to pay the rates claimed by the plaintiffs as to deprive them of the right to say

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that they have been charged too much. Now with reference to that point I have read the letters which were relied upon by Mr. Littler, and I find nothing in them to justify me in coming to the conclusion that the defendants have deprived themselves of the right of objecting to the rates as being too high. They amount to nothing more than an inquiry as to what the plaintiffs' rates were. The defendants did not bind themselves to send any goods. It was merely a question, "What are your rates for carrying goods to such and such places?" Answer, "At the present moment they are so and so. How long they are going to be so we do not undertake to say." That was all, and that clearly to my mind does not by itself deprive the defendants, if they can make out their case, of the right to say that the charges were excessive by reason of their being unequal, or on any other ground arising out of the plaintiffs' acts in carrying for other people upon other terms.

The second question was this. The defendants allege that the charges made against them were unreasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, and they seek to reduce the charges upon that ground. They also seek to set off previous payments made by them for the carriage of other goods, which they contend were over-payments because the charges were unreasonable within the same section; and inasmuch as they claim a return larger than is sufficient to cover the whole of the plaintiffs' claim, they have also made a counter-claim, in which they claim these excess payments so far as they exceed the sum necessary to cover the plaintiffs' claim in the action. The contention on the part of the plaintiffs is that this defence cannot be set up, and, on the same grounds, that neither the set-off nor the counter-claim can be maintained. If the defence cannot be set up, it is obvious that the set-off and counter-claim cannot be maintained. In order to settle that question it is necessary to look at one or two clauses of the Railway and Canal Traffic Act of 1854. The 2nd section provides that every railway company shall afford reasonable facilities for receiving and delivering traffic, and so on, and that no company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any parti-

cular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Now before that Act was passed, in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90, there was a provision requiring that the company should charge equal rates, but that had been construed by the Courts to mean equal rates for the carriage of goods over the same portions of the line, so that, if there was a charge from A. to B., which was equal to all persons sending goods from A. to B., no objection could be raised to that under s. 90 of the Railways Clauses Consolidation Act, but if a particular person, X., was charged so much for the carriage of his goods from A. to B., and another person, Y., was charged less, then there was an inequality within the meaning of s. 90 of the Railways Clauses Consolidation Act, which entitled the person aggrieved to maintain an action for the amount which had been overcharged to him. Where, however, the places over which the goods were carried were not the same, as for instance where there was a charge of so much from A. to B., and of so much from B. to C., then, although the charges might be the same, while the distances were only half in the one case what they were in the other, yet that was not an inequality within s. 90 of the Railways Clauses Consolidation Act.

In order to meet this grievance the Railway and Canal Traffic Act, 1854, was passed, and by s. 2 of that Act it is open to any person to complain that he is subjected to undue or unreasonable prejudice or disadvantage by reason of the charge for carriage from A. to B. being excessive as compared with what is charged for carriage from B. to C. That complaint was one which before then he could not have made, but under the Railway and Canal Traffic Act, 1854, he is enabled to go before the Court to make that complaint. Obviously the considerations would be of a somewhat intricate nature. It would be necessary to inquire what were the reasons why more was charged for one distance than was charged for another distance, or why proportionately more was charged for one distance than was charged for another, and that would depend upon a great many con-

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siderations, arising out of the nature of the traffic, the peculiar facilities, the competition which might be developed, and a great many other matters which quite obviously were unfit to be tried before a jury, and therefore the legislature thought fit when passing the Railway and Canal Traffic Act of 1854, to add s. 6, which is in these terms; "No proceeding shall be taken for any violation or contravention of the above enactment, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law." That latter part preserved the rights which the parties had, and, amongst other rights, that under s. 90 of the Railways Clauses Act, which, however, does not apply to this case.

The manner provided in the Railway and Canal Traffic Act, 1854, was by application to the Court of Common Pleas by motion or summons, and peculiar powers were given to the Court to enable them to deal with the complaint when it arose, and to arrive at a just estimate as to whether there was or was not any grievance to which the complainant had been subjected. (1) As I have said it was a matter which was necessarily complicated, and very unfit indeed to be tried by a common jury, to whom the consideration that the charge from A. to B. was larger in proportion to the mileage than the charge from B. to C. presented almost irresistible attractions.

Now, it is quite clear that under that section no action could be brought, because the section says distinctly that no proceedings shall be taken, and Mr. Henn Collins, who argued this case on behalf of the defendants, admitted that if no action could be brought it would be very difficult to say that a counter-claim could be maintained, or even that a set-off could be set up. But he contended that to use this Act by way of defence was not taking any proceedings for its violation, and consequently was not forbidden by s. 6. I think that one must look at the scope and purpose of the Act in order to put the correct interpretation upon s. 6, and it appears to me that the object of the legislature

(1) This jurisdiction is transferred to the Railway Commissioners by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6.

here was that this very difficult question, whether there had or had not been an undue preference or an unreasonable disadvantage, was not intended to be left to be fought out before a jury, but was intended to be decided by the special tribunal thereby appointed, and by that tribunal only. If that was the real intention of the legislature, it seems quite obvious that to raise this question by way of defence would be equally mischievous with raising it by way of an action, and consequently it appears to me that I must construe the statute in such a way as to meet what I think was the mischief at which it was pointed.

There is a case of *Denaby Main Colliery Company* v. *Manchester, Sheffield and Lincolnshire Railway Company* (1), in which the Lord Chancellor thought it might well be that no action would lie expressly for a breach of the 2nd section of the Act, but that it was a matter for consideration, which he would prefer to reserve for a future opportunity, whether if a railway company committed a breach of that section, and, in committing that breach, extorted money for carriage, to which by law they were not entitled, the ordinary remedies at law for extortion were not available. (2) I do not understand the Lord Chancellor in that passage to mean that a person whose goods have been carried by a railway company can by an action for extortion raise for the decision of a jury the question whether there has been a breach of the 2nd section, but I understand him to mean, that what he desires to reserve for future consideration is, whether, after the decision of the special tribunal that there has been a breach of the 2nd section, an action would not lie for extortion founded on the breach established in that way. In such an action there would be no contest whether there had been a breach or not, because that would have been established by the means provided by the Act, and the action would simply be to recover the moneys which by the decision of the special tribunal had been shewn to have been extorted by the railway company; and it is obvious that an action of that sort would be perfectly free from the objection which I have pointed out, because it would be no longer open to the jury to consider whether there had or had not been a breach of the 2nd section. They would be bound to accept the

(1) 11 App. Cas. 97.

(2) 11 App. Cas. at p. 112.

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decision of the special tribunal, and the only matter which would remain would be a simple matter of calculation, upon the basis of the decision of the special tribunal, how much had been the excess which had been charged to the plaintiff, and which he had been compelled to pay.

When that question arises it will have to be considered and determined, but, as far as my judgment goes, it does not arise in this case, because I think there is a clearly manifested intention of the legislature, that the question whether there has or has not been a breach of the 2nd section is to be tried, not before a jury, but before the special tribunal constituted in the way mentioned in the Act, and having the special powers of inquiring and determining which are given to it by the Act. With regard to this second point my decision must be in favour of the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Clarke, Woodcock, & Co., for Christopher Moorhouse, Manchester.*

Solicitors for the defendants: *Chester, Mayhew, Broome, & Griffithes, for H. M. Richardson, Bolton.*

P. B. H.

June 8.

OSBORNE *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Negligence—Liability—Railway Company—Dangerous Premises—Injury to Passenger—Knowledge of Nature and Extent of Danger—"Volenti non fit Injuria."

The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps were dangerous, and went down carefully holding the handrail.

Held, that the defendants had not shewn that the plaintiff with a full knowledge of the nature and extent of the danger had voluntarily agreed to incur it, so as to make the maxim "Volenti non fit injuria" applicable, and therefore he was entitled to recover.

APPEAL by the defendants from the judgment of the Judge of the County Court at Birmingham in an action to recover damages for personal injury alleged to have been caused by the negli-

gence of the defendants in allowing a flight of steps to be in a dangerous condition.

The plaintiff in his evidence at the trial stated that he was a season-ticket holder on the defendants' line, that on the morning of March 21, 1887, he went down the steps to the platform of the station at Perry Barr to take the train to Birmingham, that he went down a flight of stone steps leading to the platform, which were covered with a light layer of snow which had been trodden down and frozen over, that the steps were worn and hollowed, and were slippery, that he went down carefully and not in a hurry, but slipped on the steps, and fell, and dislocated his wrist.

In cross-examination he said that there were wooden steps leading to the platform on the other side of the line, that his train started from the platform to which the wooden steps led, that sometimes he went one way and sometimes the other, that the stone steps were on the side nearest to his house, that by going down the stone steps and crossing the line he saved going round by the bridge by which the road was carried over the railway, that the steps were dangerous without snow, that he thought it was dangerous to go down, and went down carefully, and took hold of the rail to prevent slipping, that he thought holding the rail was sufficient.

The County Court Judge was of opinion that the accident was primarily caused by the worn and defective state of the steps, which was aggravated by the frosty weather, which made them slippery in addition, that the steps had not been properly and efficiently swept and cleaned from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall, and that there was no contributory negligence on the part of the plaintiff, and gave judgment for the plaintiff for 25*l.*, the amount being agreed.

Alfred Young, for the defendants. Notwithstanding the findings of fact as to negligence the defendants are entitled to judgment. The plaintiff's own admission that he knew there was some danger shews that he voluntarily elected to go down the stone steps with full knowledge of the risk he was incurring. The maxim "Volenti non fit injuria" therefore applies, and

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prevents the plaintiff from being entitled to recover: *Thomas* v. *Quartermaine*. (1) It is true that the burden of proof lies upon the defendants, but they have satisfied the burden of proof by the plaintiff's own evidence, and for the purpose of establishing this defence it is unnecessary to rely on the evidence of the witnesses called for the defendants. The evidence in the present case is more favourable to the defendants than it was in *Yarmouth* v. *France*. (2) *Baddeley* v. *Earl Granville* (3) is distinguishable, for that decision proceeded on the ground that there was a breach of a statutory duty, which is not the case here. The application of the maxim on which the defendants rely is illustrated by such decisions as *Bridges* v. *North London Ry. Co.* (4) and numerous other similar cases where a train has drawn up beyond the platform.

W. Wills, for the plaintiff. In the first place it is not open to the defendants to rely upon the maxim "Volenti non fit injuria" in support of an appeal from a county court, for the question whether the plaintiff voluntarily undertook the risk with full knowledge of its nature and extent is one of fact. This is clearly shewn by the judgment of Lord Esher, M.R., in *Yarmouth* v. *France*. (5)

Secondly, the evidence does not shew that the plaintiff had full knowledge of the nature and extent of the risk. The necessity for such knowledge is apparent from the judgment of Bowen, L.J., in *Thomas* v. *Quartermaine* (6), where he says: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not '*scienti* non fit injuria,' but '*volenti*.' It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk: as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent."

(1) 17 Q. B. D. 414; affirmed 18 Q. B. D. 685.
(2) 19 Q. B. D. 647.
(3) 19 Q. B. D. 423.
(4) L. R. 7 H. L. 213.
(5) 19 Q. B. D. at p. 657.
(6) 18 Q. B. D. at p. 696.

The evidence in the present case comes to this, that the plaintiff knew that the steps were slippery and dangerous, but thought that he could descend safely by using the handrail. This shews that he was not aware of the nature and extent of the danger.

[He also referred to *Longmore* v. *Great Western Ry. Co.* (1); *Crafter* v. *Metropolitan Ry. Co.* (2); *Woodley* v. *Metropolitan District Ry. Co.* (3)]

Young, in reply, referred to *Shepherd* v. *Midland Ry. Co.* (4).

WILLS, J. I am of opinion that this appeal ought to be dismissed.

The case, which has been very ably argued on both sides, is not free from difficulty, for it is one of a numerous and increasing class of cases, in which the difficulty arises which was brought about by *Thomas* v. *Quartermaine* (5), a decision which has often been cited, and has been the subject of much criticism. That this difficulty exists is clear from the judgments in *Yarmouth* v. *France*. (6) It is difficult to reconcile the view there expressed by Lindley, L.J. (7), with regard to *Thomas* v. *Quartermaine* (5), with what is said by Lopes, L.J. (8) It is necessary in all cases to be careful in the application of that decision, and to see that no fallacy is introduced in applying it to the particular case under consideration. For the purposes of the present case it is enough to take the view expressed by Lord Esher, M.R., in *Yarmouth* v. *France* (9), where he says, "I see nothing in the decision in *Thomas* v. *Quartermaine* (5) to prevent the plaintiff from recovering in this case, unless the circumstances were such as to warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

It seems to me to follow that in such a case as the present, where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defend-

(1) 19 C. B. (N.S.) 183.
(2) L. R. 1 C. P. 300.
(3) 2 Ex. D. 384.
(4) 25 L. T. (N.S.) 879; 20 W. R. 705.
(5) 18 Q. B. D. 685.
(6) 19 Q. B. D. 647.
(7) 19 Q. B. D. at p. 660.
(8) 19 Q. B. D. at p. 667.
(9) 19 Q. B. D. at p. 657.

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ants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." I agree with Mr. Wills that this is a question of fact, and, this being so, it follows that the defendants could not succeed unless either they had a finding of fact in their favour, or we had all the facts before us, so that we were in a position to decide the question. I entertain some doubt as to how far this question has been dealt with by the County Court Judge. Mr. Young says it was argued before him, but it does not appear that he gave any specific decision on it. It may be that he said nothing about the question because it seemed to him to be quite clear, and if that were so he would not have found the fact in favour of the defendants; or he may have inadvertently omitted to refer to the point, in which case it would be open to us to deal with it. If I had had to decide this point as a question of fact I should have thought it necessary that the plaintiff should be asked more questions than he was asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher, M.R., in *Yarmouth* v. *France* (1), which I have already quoted, and those of Bowen, L.J., in *Thomas* v. *Quartermaine* (2), which were referred to in the course of the argument. Those observations go far to make it hard for a defendant to succeed on such a defence as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped. These judgments introduce an important qualification of the maxim "Volenti non fit injuria."

In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow; I know quite enough about ice and snow to know how easy it is to make such a mistake,

(1) 19 Q. B. D. at p. 657. (2) 18 Q. B. D. at p. 696.

and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The County Court Judge has not found the fact the defendants need; and upon the present materials I certainly am not prepared to supply the deficiency.

For these reasons, the onus of proof being on the defendants, I think that on the evidence as it stands their defence is not made out, and therefore their appeal must be dismissed.

GRANTHAM, J. I am of the same opinion.

I think that the judgment of Bowen, L.J., in *Thomas* v. *Quartermaine* (1) confirms the view which I take, that the maxim "Volenti non fit injuria" does not apply to such a case as the present. If it did it would go to the root of the liability of all persons who would otherwise be liable to provide safe premises or safe machinery. For instance, in the case of a stage coach, if a passenger sees that one of the horses is vicious, is he bound to stay at home and give up his journey, or if he does not do so, and suffers injury, is he to lose all remedy? The same considerations would apply in the case of a railway. It seems to me that the whole difficulty in the present case arises from the answer of the plaintiff to a question put to him in cross-examination being too much relied on. What he meant was that he knew there was some danger in going down the steps, and that it was necessary to be careful, but he thought he could get down safely with the assistance of the handrail. The only chance for the defendants was to shew contributory negligence on the part of the plaintiff, and this they have failed to shew.

Appeal dismissed; leave to appeal refused.

Solicitors for plaintiff: *Burton & Co., for Johnson, Barclay, Johnson, & Rogers, Birmingham.*

Solicitor for defendants: *C. H. Mason.*

(1) 18 Q. B. D. 685.

P. B. H.

1888
May 14;
July 5.

BRERETON AND WIFE *v.* EDWARDS.

*Practice—Charging Order—Jurisdiction to make—Money standing to Credit of Judgment Debtor in Chancery Division—*1 & 2 *Vict. c.* 110, *s.* 14—3 & 4 *Vict. c.* 82, *s.* 1—*Rules of the Supreme Court,* 1883, *Order* XLVI., *rr.* 1, 3—*Judicature Act,* 1873, *s.* 24, *sub-s.* 7.

Under Order XLVI. rr. 1, 3, a charging order may be made on cash standing to the credit of the judgment debtor in the name of the Paymaster-General.

APPLICATION to discharge a charging order made by Field, J., whereby the sum of 48*l.* due to the plaintiffs as judgment creditors was charged upon a sum of 65*l.* 12*s.* 2*d.*, the proceeds of consols sold by order of the Court, payable to the defendant, the judgment debtor, in an action in the Chancery Division, and standing to his credit in the name of the Paymaster-General, on the ground that there was no jurisdiction to make such order.

The application was made on behalf of the guardians of the poor of the Congleton Union, who had obtained a subsequent order in the Chancery Division charging the fund with 14*l.* 12*s.* 0*d.*, due to them for the maintenance of the judgment debtor as a pauper. Payment had been refused in consequence of the prior order in favour of the judgment creditors.

Avory, for the applicants. There was no jurisdiction to make the order. The power to make charging orders is limited by Order XLVI., r. 1, and the provisions of 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1. (1) The order purports to create a

(1) By Rules of Supreme Court, 1883, Order XLVI., r. 1: "An order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1." By Order XLVI., r. 3, "The expression 'stock' includes shares, securities and money."

By 1 & 2 Vict. c. 110, s. 14: "If any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster, shall have any Government stock, funds or annuities, or any stock or shares of or in any public company in England . . . . standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the

charge on a sum of money realized by the sale of consols. The rule and the sections only enable the Court to charge "the interest of the judgment debtor" in "Government stock, funds or annuities or shares in public companies," and "in the dividends, interest or annual produce of such stock, funds, annuities or shares." There is no power to charge mere money, and the fund in Court, though arising from a sale of Government stock, does not fall under any of the designations in the rule or in the sections of the Acts.

[He cited *Dixon* v. *Wrench*. (1)]

E. Brodie Cooper, for the execution creditors. In Seton on Decrees, 4th ed., part 2, ch. 6, s. 2 (vol. 1, pp. 305, 6), there is a form of an order charging money, made by Malins, V.C., in an action in the Chancery Division. The words "interest of the judgment debtor" in 3 & 4 Vict. c. 82, s. 1, and the definition of "stock" as including "money" in Order XLVI., r. 3, shew that such an order is within the statutory jurisdiction of the judge.

Avory, in reply. The form in Seton on Decrees is beyond the scope of the Acts. Even if the charging order were valid, as the judgment creditors did not obtain a stop-order, the order

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application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them, or such part of them thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon."

By 3 & 4 Vict. c. 82, s. 1: "The aforesaid provisions of the said Act (i.e. 1 & 2 Vict. c. 110, s. 14) shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares."

By the Judicature Act, 1873, s. 24, sub-s. 7: "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

(1) Law Rep. 4 Ex. 154.

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obtained by the applicants in the Chancery Division is entitled to priority.

Cur. adv. vult.

1888. July 5. The judgment of the Court (Lord Coleridge, C.J., and Mathew, J.) was delivered by:—

MATHEW, J. This was an application to set aside an order of my brother Field charging in favour of a judgment creditor a sum of money payable by order of the Chancery Division to the judgment debtor and standing to his credit in the hands of the Paymaster-General. After the order nisi had been obtained the guardians of the poor of the Congleton Union applied for and obtained in the Chancery Division an order charging the fund with the amount of a debt due to them for the maintenance as a pauper of the judgment debtor. The fund was insufficient to meet both demands, and in order to displace the charge of the judgment creditor the guardians applied to the Court to set aside the order of Field, J., as having been made without jurisdiction.

It was argued that the learned judge had no power to direct that the fund should be charged in favour of the judgment creditor, inasmuch as the statutes 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, did not apply to money, but only to Government stock, funds, annuities, or shares in public companies. As against this contention it was argued for the judgment creditor that there was power to make the order independently of the provisions in the statutes in question. It was pointed out that in Seton on Decrees (4th ed. vol. i., part 2, c. 26, s. 2, pp. 305, 6) there are forms of orders charging sums of money in favour of judgment creditors, and upon inquiry of officers of the Courts in the Chancery Division, we have been informed that such orders have occasionally been made. The fact that according to the statement in Seton on Decrees (4th ed. vol. i., part 2, ch. 6, s. 2, p. 305) one such order was expressly sanctioned by a learned Vice-Chancellor would be sufficient to prevent our granting this application. A similar order would appear to have been made without objection in the case of *Carter* v. *Stadden*. (1) But even

(1) 34 W. R. 363.

if there were no such authority in support of the order made by Field, J., we should be of opinion that there was jurisdiction to make the charge in question as process of equitable execution. There can be no doubt that an order for the appointment of a receiver might have been made in favour of the judgment creditor. But there would seem to be no reason why this formal mode of proceeding should be adopted where, as in this case, the fund was small and the money was in the hands of a public official, the Paymaster-General. The order amounted to a direction that the Paymaster-General should act as receiver for the judgment creditor. The extensive powers conferred upon the Court by s. 24, sub-s. 7, of the Judicature Act, 1873, would appear to authorize the order in question. See the judgment of the late Master of the Rolls in *Salt* v. *Cooper*. (1) An instance of a somewhat similar interference by the Court in favour of a judgment creditor under the old Chancery practice will be found in *Watts* v. *Jefferyes*. (2) The motion must therefore be refused with costs.

Motion refused.

Solicitors for applicants: *Hicklin, Washington & Pasmore.*

Solicitors for judgment creditors: *Scott, Jarmain, Trass & Jarmain.*

(1) 16 Ch. D. 544.

(2) 3 Mac. & G. 372.

H. D. W.

1888
June 18, 29.

LEWIN *v.* TRIMMING.

TRIMMING *v.* LEWIN AND CHADWICK & SONS, BY COUNTER-CLAIM.

Practice—Costs—Counter-claim—Counter-claim against Third Party—Trial by Judge without Jury—Discretion of Judge—County Courts Act, 1867, *s.* 5—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Rules of Supreme Court*, 1883, *Order* XXI., *rr.* 11, 12, 13, 14—*Order* LXV., *r.* 1.

In an action by landlord against tenant for rent, the defendant brought a counter-claim against the plaintiff and third parties for illegal distress. The judge, before whom the case was tried without a jury, gave judgment for the plaintiff on the claim and the counter-claim, but for the defendant against the third parties for 2*l.* 5*s.* "with such costs as the defendant would be entitled to by law":—

Held, that as the case had been tried without a jury, the costs were by Order LXV., r. 1, in the discretion of the judge, and, there having been no exercise of such discretion in favour of the defendant as against the third parties, the defendant was not "entitled by law" to costs.

Semble per Huddleston, B., and Charles, J., that when the counter-claim is against a person not a party to the action, s. 24, sub-s. 3, of the Judicature Act, 1883, and Order XXI., rr. 11, 12, 13, 14, do not render s. 5 of the County Courts Act, 1867, applicable to such a counter-claim.

APPEAL from the decision of Grantham, J. at chambers affirming the decision of the master, who had refused to tax the costs of the defendant as against Messrs. Chadwick & Sons, defendants to the counter-claim. The action was brought by the plaintiff to recover rent from the defendant, his tenant. The defendant by her counter-claim claimed damages against the plaintiff and Messrs. Chadwick and Son, the bailiffs employed by the plaintiff, for illegal distress. Stephen, J., before whom the case was tried without a jury, gave judgment for the plaintiff for 147*l.* 7*s.* 6*d.* in respect of rent, and also on the counter-claim, and judgment for the defendant against Messrs. Chadwick & Co., defendants to the counter-claim, for 2*l.* 5*s.* "with such costs as the defendant would be entitled to by law." The master and Grantham, J., held, that s. 5 of the County Courts Act, 1867, applied to the counter-claim against Messrs Chadwick & Son, and that the defendant having recovered under such counter-claim less than 10*l.* as damages in tort was not entitled to costs.

Beddall, for the defendant. The case having been tried by a judge without a jury, the costs are by Order LXV., r. 1 (1) in the discretion of the judge. The form of the judgment shews an exercise of that discretion in favour of the defendant as against the defendants to the counter-claim. Sect. 5 of the County Courts Act, 1867 (1), does not apply. A defendant counter-

(1) By the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, "If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, the plaintiff shall recover a sum not exceeding twenty pounds if founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

By the Judicature Act, 1873, s. 24, sub-s. 3, "The said Courts and every judge thereof shall have power to grant to any defendant . . . all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

By Rules of Supreme Court, 1883, Order XXI., r. 11, "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

Rule 12. "Where any such person as in the last preceding rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 2 in Appendix B. or to the like effect." Form No. 2 in Appendix B. (notice of counter-claim, Order XXI., r. 12) is as follows . . . "Take notice that if you do not appear to the within counter-claim of the within named C. D. within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence."

Rule 13. "Any person not a defen-

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claiming against a third party is not a "plaintiff," and a "counter-claim" is not an "action commenced" within the meaning of that section. The action itself could not have been brought in a county court. On the other hand, the counter-claim against Messrs. Chadwick & Co. could have been made a county court action, and is in the High Court only because the action is itself in the High Court. As s. 5 of the County Courts Act, 1867, does not apply, the defendant is "entitled by law" to his costs against the defendants to the counter-claim. [He cited *McGowan* v. *Middleton*. (1)]

Buckmaster, for the defendants to the counter-claim. A third party who receives notice of a claim pursuant to the rules is by s. 24, sub-s. 3, of the Judicature Act, 1873, in the same position as a defendant in an independent action. He has "the same rights in respect of his defence as if he had been duly sued in the ordinary way." The defendant as regards this counter-claim is a "plaintiff" within s. 5 of the County Courts Act, 1867, and one of the "rights" of the defendants to the counter-claim under s. 24, sub-s. 3, of the Judicature Act, 1873, is immunity from costs, where not exceeding 10*l.* is recovered against them in tort in an action in the High Court.

Beddall, in reply. Sect. 24, sub-s. 3, of the Judicature Act, 1873, refers not to costs but to procedure. Judgment on the counter-claim against the plaintiff would have carried costs: *Blake* v. *Appleyard*. (2) The rule should be the same as regards the defendants to the counter-claim.

Cur. adv. vult.

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dant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action."

Rule 14. "Any person named in a defence as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim."

By Order LXV., r. 1, "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or judge . . . provided that where any action, cause, matter or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter or issue is tried, or the Court, shall, for good cause, otherwise order."

(1) 11 Q. B. D. 464.

(2) 3 Ex. D. 195.

1888. June 29. The judgment of the Court (Huddleston, B., and Charles, J.) was delivered by

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HUDDLESTON, B. In this case the plaintiff recovered a verdict for rent against the defendant Mrs. Trimming for 142*l.* 17*s.* 6*d.* The defendant Mrs. Trimming counter-claimed for illegal distress against the plaintiff and Chadwick & Co., who, under Order XXI., r. 12, had been served with a copy of the defence. The cause was tried before Stephen, J., without a jury, and the learned judge gave judgment for the plaintiff with costs on claim and counter-claim, but as to Messrs. Chadwick, gave judgment for the defendant for 2*l.* 5*s.* "with such costs as the defendant would be entitled to by law." The defendant having carried in her costs for taxation, the master refused to tax on the ground that the 5th section of the County Courts Act, 1867, applied to the case. The learned judge at chambers confirmed his decision. We are of opinion that the refusal to tax was right, though not upon the ground taken by the master and the judge.

The defendant's right to costs, in a case not tried by a jury, is now regulated solely by Order LXV., r. 1, of the Rules of the Supreme Court, which provide that the costs shall be in the discretion of the judge. That rule in effect repeals all the earlier statutes as to costs inconsistent with it; and in 1879 most of those statutes, including the Statute of Gloucester (6 Edw. 1, c. 1), were expressly repealed by statute 42 & 43 Vict. c. 59. In the absence, therefore, of the exercise of the discretion of the judge, the defendant is not "entitled by law" to any costs; and, after consideration, we do not feel able to regard the judgment and directions as to costs given at the trial as an exercise of discretion in the defendant's favour under Order LXV., r. 1. The question, therefore, which was argued at length before us, does not really arise; but we think it right nevertheless to give our opinion upon it.

Now, if the defendant had recovered such a sum as was recovered here against the plaintiff on his counter-claim, it has been decided in *Blake* v. *Appleyard* (1), that s. 5 of the County Courts Act, 1867, has no application, and the defendant is entitled to his costs. (See also *Chatfield* v. *Sedgwick* (2)). The ground

(1) 3 Ex. D. 195. (2) 4 C. P. D. 459.

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of that decision was that a counter-claim, though it is to have by Order XIX., r. 3, "the same effect as a cross-action," is nevertheless not an "action." To use the language of the Master of the Rolls in *McGowan* v. *Middleton* (1), "A counter-claim is not a cross-action; it cannot be deemed an action, not being commenced by writ of summons. But a counter-claim must be treated as if it were a procedure in a cross-action." Further, a defendant who counter-claims cannot be considered a "plaintiff," a word which by s. 100 of the Judicature Act, 1873, includes "every person asking any relief against any other person otherwise than by way of counter-claim as a defendant." But it is contended that when the counter-claim is against a person other than the plaintiff, the County Courts Act, 1867, s. 5, does apply by reason of the provisions of s. 24, sub-s. 3, of the Judicature Act, 1873, and of Order XXI., rr. 11 to 14.

Sect. 24, sub-s. 3, of the Judicature Act, 1873, enacts that any person served with notice in writing of a counter-claim in any cause or matter "shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly served in the ordinary way by such defendant." By Order XXI., r. 12, when the counter-claim is against a person not a party to the action, "he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served shall be indorsed in the Form No. 2, in Appendix B., or to the like effect." The notice is as follows: "Take notice that if you do not appear to the within counter-claim of the within named —— within eight days from the service of this defence and counter-claim upon you, you will be liable to have judgment given against you in your absence." By r. 13, "any person not a defendant to the action who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action," and by r. 14, "any person named in a defence as a party to a counter-claim thereby made, may deliver a reply within the time within which he might

(1) 11 Q. B. D. 464, at p. 468.

deliver a defence if it were a statement of claim." These rules certainly place the third person in a position analogous to that of a defendant, but they do not constitute him a defendant, nor do they constitute the defendant who counter-claims a plaintiff, and in our opinion a counter-claim cannot be considered a cross-action in the case of a third person, any more than it can in the case of a plaintiff.

There remains to be considered the language of sub-s. 3, of s. 24, of the Judicature Act, 1873. It is contended that the enactment that a third person counter-claimed against is to have "the same rights in respect of his defence" against such claim as if he had been duly served in the ordinary way by such defendant," involves his immunity from costs where less than 10*l.* is recovered against him in tort. This is alleged to be a right "in respect of his defence." But we cannot adopt such a view of the words used. They appear to us to point rather to rights of pleading, time to plead, and so on, than to any enactment as to costs. It would, we think, be straining the language of the Act of Parliament to hold that it has rendered applicable to a third party counter-claimed against the provisions of the County Courts Act, 1867, s. 5.

Although, however, this is our view, we must, for reasons given at the commencement of this judgment, dismiss this appeal; but having regard to the fact that upon the point argued the appellant has succeeded it will be dismissed without costs.

Appeal dismissed.

Solicitor for defendant: *R. Chapman.*
Solicitor for defendants to counter-claim: *Joseph Fox.*

H. D. W.

1888
June 5.

In re MARIA ANNIE DAVIES.

Practice—Contempt of Court—Punishment of Contempt of Court by Imprisonment—Terms of Order for Discharge of Prisoner.

The defendant was in custody for contempt of Court under the following circumstances.

In 1877, she had brought an action for the recovery of some houses which she supposed to be her property. It was decided that she had no title, but between this date and 1886 she continued to assert her claim by legal proceedings, and attempted to take forcible possession of the premises. In 1885 an injunction was obtained by the plaintiff restraining the defendant and her agents from further molesting the owner and tenants of the estate; but she, notwithstanding, again endeavoured to take possession, and was in consequence, in December, 1886, imprisoned for contempt of Court. She was informed when sent to prison that if she would undertake to abandon her claim and to abstain from further efforts to take possession of the premises, she would be released. She refused to give this undertaking, and in consequence remained in custody till June, 1888:—

Held (in June, 1888), that the defendant might be discharged from custody on the terms of an order which had been assented to by the counsel for the plaintiff, and which was read in her presence.

The terms of the order were that the injunction should continue for the term for which the plaintiff held the premises, and that in order to prevent any breach of the injunction by the defendant, a copy of the order should be given to the owner with a view to his obtaining the assistance of the police, should the defendant again attempt to obtain possession; that in case of any breach of the injunction the official solicitor should, upon the application of the plaintiff, take the necessary steps to bring the offenders before the Court and to enforce performance of the order; that the defendant should not be allowed to issue any writ or summons, or make any application or motion without the leave of a judge at chambers, and that, should notice of any application or motion be given without such leave, the official solicitor might be informed by letter, and the respondent should not be required to appear unless the Court should otherwise order.

Maria Annie Davies, the defendant in an action of *Rutson* v. *Davies*, who had been imprisoned for contempt of Court since December, 1886, was brought before the Court to be informed of the terms of an order made for her discharge. The contempt for which she had been committed was the breach of an injunction restraining her and her servants from attempting to take possession of two houses in Kensington Park Road.

T. Willes Chitty, counsel for the plaintiff, attended as amicus curiæ.

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IN RE MARIA ANNIE DAVIES.

MATHEW, J. We have directed Mrs. Davies, who has been imprisoned since December, 1886, for contempt of Court, to be brought before us, in order that we should state in her hearing the terms upon which we are of opinion that she should be released from custody.

Mrs. Davies many years ago brought an action for the recovery of some houses which she supposed to be her property. It was decided that she had no title, but ever since judgment was given against her she has sought by various legal proceedings, which were altogether ineffectual, to establish her claim. Finally, under the fixed impression that wrong had been done her, she attempted to take forcible possession, and by an order of Kay, J., an injunction was obtained restraining her and her agents from further molesting the owner and tenants of the estate. Notwithstanding the injunction she renewed her attempt to take possession, and by an order of Huddleston, B., and Manisty, J., sitting as a Divisional Court, she was sent to prison for contempt of Court. She was informed that she would be released upon her promising to give up her idle and vexatious claim, and undertaking to abstain from further attempts to enter upon the property. It was doubtless supposed by the judges that she would speedily apply for her release, and give the undertaking required of her. But Mrs. Davies, it would seem, cannot be prevailed upon to acknowledge that she is in the wrong, and the consequence of the order of the Divisional Court has been that she has remained in prison for eighteen months. On a former occasion, we directed that Mrs. Davies should be brought before us with a view of setting her at liberty; but she behaved so unreasonably that we were compelled most reluctantly to order that she should remain in custody while we took time to consider whether an order could be made which would adequately protect those who are now, or may hereafter be, in possession of the property, and thus accomplish what the Divisional Court had in view when Mrs. Davies was sent to prison.

A form of order has been drawn up which has been furnished to the plaintiff's learned counsel, Mr. Chitty, and with which, as we understand, his clients are satisfied. It will be in the following terms:—[The learned judge read the order.]

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Mathew, J.

My Lord agrees with me that Mrs. Davies should now be discharged; but for the observations which follow I alone am responsible. I desire to express the opinion that in cases where the contempt for which punishment is inflicted is the doing of an act prohibited by an order of the Court—where, what has been done by the offender cannot be undone—it is not advisable that an order for committal should be so framed as to permit the possibility of the lamentable consequences to the prisoner which have followed upon the sentence in this case. It should be borne in mind that contempt of Court is a criminal offence, punishable as a misdemeanour by fine and imprisonment or both: 4 Blackstone, 337; 2 Hawkins, P. C., bk. 2, c. 22. The punishment should be commensurate with the offence. It may be severe where the contempt is grave: as for instance in the rare cases where an insult is offered in court to the judge who presides, or where a deliberate attempt is made to interfere with the due and ordinary methods of carrying out the law, as in the case of *Onslow* v. *Skipworth*. (1) So where a witness refuses to give evidence in obedience to a subpœna, he may be committed for contempt. The commitment in such cases is described by Willes, J., as a sentence upon a summary conviction for an offence against the law, and in the view of that very learned judge a commitment for a time certain is a correct, "if not the only correct course": see *Ex parte Fernandez*. (2) A commitment until the offender consented to give evidence, would not, in my judgment, be the proper order to make. On the other hand, where it appears that the act done is due to a mistaken view of the rights of the offender, the punishment, where imprisonment is deemed necessary, should be for a definite period and should not be severe.

We are not without guidance in dealing with cases of the description from the ordinary course of administering the criminal law according to the customs of England. It would not be right for a judge sitting in a criminal court, and compelled to sentence a prisoner, to direct that his imprisonment should continue until some condition, however reasonable the condition might be, had been complied with. A prisoner is entitled, when he has undergone his punishment, to an unconditional release.

(1) Law Rep. 9 Q. B. 219, 231. (2) 10 C. B. (N.S.) 39; 30 L. J. (C.P.) 31.

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Further, we have the assistance of the opinion of the legislature against indefinite imprisonment for contempt of court expressed in Acts of Parliament and Rules of Court having Parliamentary sanction.

Under the old procedure of the Court of Chancery an attachment for an indefinite period was often obtainable as of course, and, as was said, ex debito justitiæ. But under the new Rules of Court the old law of contempt has been materially modified. The granting of an attachment is now discretionary, and this discretion would seem to be conferred upon the Court to protect offenders against punishments of undue severity.

Before the Debtors Act of 1869 a defaulting trustee might be imprisoned as for contempt of Court for not obeying an order to replace the trust fund. But under that statute the power to imprison for disobeying the order of the Court, even in the case of grave delinquency on the part of the trustee, is restricted to a period of twelve months.

By the later Act of 1878 the Court is given a discretion, which it was supposed did not previously exist, to refuse to apply the process of contempt where the trustee was shewn not to have been guilty of personal misconduct, or where for any other good cause the order ought not to be made.

Under the County Courts Act (9 & 10 Vict. c. 95, s. 113) imprisonment for contempt must be for a definite period only not exceeding seven days.

The offence of Mrs. Davies, annoying and vexatious as it undoubtedly was, cannot be considered as of a serious nature, or one meriting a long incarceration. I regret that a form of order similar to that which we now make was not adopted in the first instance. Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the late Master of the Rolls in the case of *Re Clement* (1) seem much in point: "It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see

(1) 46 L. J. (Ch.) 375.

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whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction." In this statement of principle Mellish, L.J., expressed his concurrence.

LORD COLERIDGE, C.J. I assent to the proposed order, but I do so distinctly on the ground that it is assented to on behalf of the plaintiff in the action as affording him adequate protection. Where the Court has given its decision, and the person against whom the Court has decided defies the Court, ignores its decision, and persists in persecuting the person in whose favour the Court has decided with groundless claims and vexatious actions, however reluctant the Court may be to do so, it has, in my opinion, no choice but to enforce its judgment by the imprisonment of the contumacious person. There is nothing to the contrary, as it appears to me, in the authorities which have been cited by my learned Brother. Happily in this case a method has been found of protecting the person whom the Court is bound to protect, and under these circumstances I agree that the prisoner should be discharged from custody.

The order was as follows:—

TUESDAY, 5TH JUNE, 1888.

It appearing from the report of Master Brewer, dated the 20th day of April, 1882, made after inquiry, and by the order hereinafter mentioned, that the defendant, Maria Annie Davies, formerly of 179, Goswell Road, St. Luke's, but now a prisoner in Her Majesty's prison at Holloway, in the county of Middlesex, has no right or title to the premises Nos. 160 and 162, Kensington Park Road, Notting Hill, in the said county of Middlesex, and that by an order

of the Honourable Mr. Justice Kay, made in the Chancery Division of Her Majesty's High Court of Justice, dated the 29th day of June, 1885, she was restrained by injunction from committing any trespass or entering upon the said premises; that by another order of the Honourable Mr. Justice Kay, dated the 12th day of December, 1886, together with the consent of the Right Honourable the Lord Chief Justice of England, this action was transferred to this Division, and that by an order of this Court, dated the 14th day of December, 1886, a writ of attachment was ordered to be issued against the defendant for her contempt in committing a trespass on the said premises in disobedience to the above order of the 29th day of June, 1885, upon which she was on the 20th day of December, 1886, arrested and committed to the said prison at Holloway, where she has since remained. And upon hearing Mr. T. W. Chitty of counsel for the said plaintiff and the said defendant in person, it is ordered—

1. That the said defendant be discharged out of the custody of the gaoler of the said prison as to her commitment by virtue of the said writ of attachment.

2. That the said injunction be continued and made perpetual in the terms thereof, videlicet, that "the said defendant, Maria Annie Davies, her servants and agents, be restrained until judgment in this action or further order from distraining upon or in any manner during the residue of the term of twenty-one years from 8th February, 1877, granted by a lease dated 22nd January, 1877, in the said writ mentioned, disturbing or interfering with any of the plaintiff's lessees or tenants of the hereditaments situate and being Nos. 160 and 162 Kensington Park Road, Notting Hill, in the county of Middlesex, or from committing any trespass or entering upon the aforesaid premises or any part thereof."

3. That a copy of this order be handed to the owner of the premises, with a view to his obtaining the assistance of all constables and peace officers in case the said defendant should attempt to obtain forcible possession.

4. That in case the said defendant or her agents shall be guilty of a further breach of the injunction, the official solicitor shall, upon the application of the said plaintiff, take the necessary steps to bring the offenders before the Court, and to enforce the performance of this order.

5. That the said Maria Annie Davies be not allowed to issue any writ or summons, or make any application or motion against any person or persons without the leave of a judge at chambers being first obtained. And if notice of any application or motion be given without such leave being first obtained, the official solicitor may be informed by letter, and the respondent shall not be required to appear unless the Court shall otherwise order.

The prisoner was discharged.

H. D. W.

1888
May 31.

IN RE DOD, LONGSTAFFE, & CO. EX PARTE LAMOND.

Solicitor—Costs in County Court—Scale of Costs in Actions under 10*l.*—*County Court Act*, 1875 (38 & 39 *Vict. c.* 50).

The Appendix to the County Court Rules, 1886, contains a scale of costs as between solicitor and client where the amount recovered exceeds 2*l.* and does not exceed 10*l.*, and provides that no other costs are to be allowed where the amount claimed does not exceed 10*l.* unless the judge certifies under s. 5 of the County Courts (Costs and Salaries) Act, 1882. The plaintiff having commenced an action in a county court for 10*l.* consulted solicitors with reference to it, who, after taking various steps to investigate the claim, recommended a settlement, which the plaintiff refused to accept. The solicitors then returned her papers to the plaintiff, who proceeded with the action in person:—

Held, that upon the taxation of the solicitors' bill for the services rendered by them, it was a question for the master whether the solicitors had, in fact, acted in the conduct of the action, and that if they appeared to have so acted they could recover no other costs than those specified in the Appendix.

In re Emanuel & Co. (9 Q. B. D. 408) considered.

APPEAL from an order of Denman, J., in Chambers refusing to review the taxation of a bill of costs as between solicitor and client. It appeared that the client having personally entered a plaint in a county court claiming 10*l.* was introduced to the solicitors and consulted them on the subject. They had interviews, and conferences, and correspondence with her and the defendant's solicitors to investigate the facts of the case, and eventually advised her to accept in settlement a certain sum which had been paid into court. She, however, determined to go on with the action, whereupon the solicitors returned to her the papers in order that she might conduct the case herself. She did so and was unsuccessful. The solicitors delivered to her their bill headed: "In the Brompton County Court, *Yourself* v. *Phillips*, claim 10*l.*," for their conferences, attendances, and letters, charging at the rate of 6*s.* 8*d.* for attendances and 3*s.* 6*d.* for letters. The total amount of the bill was 3*l.* 4*s.* 6*d.* On taxation the master disallowed the sum of 7*s.*, but the client carried in objections to the whole bill on the grounds (1) that the items were not authorized by the county court scale; (2) that each item had been allowed upon the High Court scale, whereas the

items related to a county court action and the subject-matter did not exceed 10*l.*

Bray, for the client. The County Court Rules, 1886, Appendix, prescribe the "costs to be paid to solicitors in actions and matters as well as between party and party as between solicitor and client where the amount recovered exceeds 2*l.* and does not exceed 10*l.*," and, after stating the "lower scale" costs, declare that "no other costs are to be allowed than the above where the amount claimed does not exceed 10*l.* unless the judge certifies under s. 5 of the County Courts (Courts and Salaries) Act, 1882." Everything done in the course of an action is intended to be dealt with in the scale, as the provision for cases where the amount is above 10*l.* shews. The present bill is for attendances, conferences, and letters, for which nothing can be charged. The solicitors must agree in writing with the client in order to obtain payment beyond the scale allowance. The solicitors withdrew from the cause before trial, and therefore cannot claim costs. The Act 19 & 20 Vict. c. 108, s. 36, enacts that where in any action the debt or damage claimed shall not exceed 20*l.* an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in s. 91 of 9 & 10 Vict. c. 95, without an agreement in writing.

Lindsell, for the solicitors. In *In re Emanuel & Co.* (1) it was held that for work done out of court, charges other than those specified in the then existing scale, which differs little from the present one, could be recovered. The rules are confined to items in the conduct of a suit, but the charges are here for matters which are not involved in the conduct of a suit. The client brought her action in person and merely came to the solicitors for advice. They advised her not to go on with the action and returned her papers, taking no further steps.

Bray, in reply. The heading and items of the bill of costs shew that the charges have reference to the action and steps which were taken in it. The client applied to the solicitors to conduct the proceedings and did not merely apply to them for advice.

(1) 9 Q. B. D. 408.

1888

IN RE DOD, LONGSTAFFE, & CO. EX PARTE LAMOND.

WILLS, J. I am of opinion that this taxation must be reconsidered. The amount in dispute is small, but the case is of much general importance. The new Rules of 1886 were, I think, intended to meet the decision in *In re Emanuel* (1), and to prevent solicitors in cases of small claims recovering from their clients any more than the very small costs allowed by the scale. The legislation may, of course, be criticised. It may be said, on the one side, that it is important to keep down the amount of costs, and on the other, that the Rules meant for that purpose have a tendency to throw legal business into the hands of an inferior class of practitioners. But the policy of the provisions was for the legislature and is not for us to consider, and its nature is so distinctly evinced by the power given to the county court judges of making rules, and so distinctly carried out by the Rules made in 1886, that I have no doubt, notwithstanding the case of *In re Emanuel* (1), that no costs as between solicitor and client can be recovered for matters within the scale except under it. Therefore, hard as it might seem in this particular case, still if the solicitors were really employed as solicitors in the action, I am clearly of opinion, that the Rules would apply, and they could not have these costs. But I think that the decision of the master and my brother Denman may be supported if the facts bear out the view suggested by the learned counsel for the solicitors that the client never employed the solicitors as solicitors "in the action" at all. Whether she did so or not is a question of fact which has not been sufficiently determined, and I think the case should be remitted to the master that he may ascertain the fact. If the client, having brought the action herself, desired to have legal advice as to whether she should proceed with that action which she had brought, and in fact the nature of the employment of the solicitors was to give her advice outside the action as to what she had better do, and if all was done by the solicitors on that basis, then they were not employed as solicitors in the action, and are entitled to succeed. If, however, they were once employed to conduct this action and accepted that employment so that the retainer brought the County Court Rules into operation, and then, finding out after-

(1) 9 Q. B. D. 408.

wards that their duty was to advise her not to proceed with the action, they did so, and she would not take their advice, and nothing was done to change the character of the original employment, I am afraid that the Rules would prevent the solicitors from recovering the amount of the bill, because the solicitors cannot by simply withdrawing from the retainer once accepted put themselves on a better footing than they would otherwise be entitled to. I feel the necessity of not offering the least encouragement to any evasion of an enactment intended to protect those who cannot well protect themselves, and I therefore think it wiser to send the case back to the master to review his taxation in reference to the state of facts. If he finds that the employment was outside the conducting of the county court action then the solicitors will be entitled to their charges. If they were employed to conduct the action but gave it up, I think the Rules prevent their recovering more than the scale charges.

GRANTHAM, J. I am of the same opinion. I entirely agree with my learned Brother as to the general principle of the County Court Rules and the power of the county court judges to make them. I think that, whether *In re Emanuel* (1) was good law or not, it has ceased to be binding in consequence of these rules. There seem to be sufficient materials on which to say that the work was not done in the conduct of the action, but it is well that the case should go back, that the decision may be distinctly a decision on the ground that the work charged for was not done in the conduct of county court proceedings.

Solicitors for applicants: *Dod, Longstaffe, Son, & Fenwick.*
Solicitor for respondent: *George B. Crook.*

(1) 9 Q. B. D. 408.

J. R.

1888
June 23.

[IN THE COURT OF APPEAL.]

GRAY, ON BEHALF OF THE WEST OF ENGLAND FIRE AND LIFE INSURANCE COMPANY *v.* HOPPER.

County Court—Practice—Power to remit Action—Judgment under Order XIV. *for Part of Claim—Reduction of Claim to a Sum not exceeding Fifty Pounds—"Payment, payment into court, admitted set-off, or otherwise"—County Courts Act*, 1856 (19 *&* 20 *Vict. c.* 108), *s.* 26—*County Courts Act*, 1875 (30 *&* 31 *Vict. c.* 142), *s* 7.

Payment by the defendant of part of the plaintiff's claim pursuant to a judgment under Order XIV. r. 4, is a reduction of such claim within s. 26 of the County Courts Act, 1856, and when the claim is reduced by such payment to a sum not exceeding 50*l.*, the action may be remitted to a county court for trial.

Judgment of the Queen's Bench Division (ante p. 15) affirmed.

THIS was an appeal from a judgment of the Queen's Bench Division (reported ante, p. 15).

The action was brought to recover 66*l.* The plaintiff had judgment under Order XIV. for 28*l.*, and the defendant paid that sum. The district registrar at Newcastle-on-Tyne treated the claim as "reduced to a sum not exceeding 50*l.*" within the meaning of the County Courts Act, 1856, s. 26, and remitted the action for trial in the Newcastle-on-Tyne County Court. (1)

Denman, J., at chambers, and the Divisional Court on appeal confirmed this order. (2)

The defendant appealed.

H. Tindal Atkinson, for the defendant. There was no jurisdiction to make this order. Payment in s. 26 means a payment before action, and the only one of the terms used which applies to something done after action brought is "payment into court." The general expression "or otherwise" is not affected by those

(1) 19 & 20 Vict. c. 108, s. 26, enacts: "Where in any action of contract, brought in a superior court, the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, a judge of a superior court, on the application of either party, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name." . . . .

(2) Ante, p. 15.

words, but is limited by the words which immediately precede it, and like them must apply to something done before action. Such a payment as this could not have been contemplated when the statute was passed. In the County Courts Act, 1867, s. 7, a similar power is given, to be exercised at the instance of the defendant. (1) The words "payment into court" do not occur, but otherwise the clauses are similar, and it has been held that the general expression "or otherwise" is limited to matters that arose before action: *Osborne* v. *Homburg* (2); *Foster* v. *Usherwood*. (3)

French, Q.C. (*H. Newson* with him), for the plaintiff. Payment and set-off arising after action may be pleaded: Order XXIV. r. 1, and payment into court must necessarily be after action. Consequently the generality of the words "or otherwise" cannot be limited as suggested. The conditions of an application under the County Courts Act, 1867, s. 7, are quite different, for the application can only be made by the defendant, and within eight days after service of the writ. This accounts for the omission of the words "payment into court," and cases decided on that section are not applicable to the present case. [He was stopped.]

LORD ESHER, M.R. It seems to me, as Bramwell, B., pointed out in *Foster* v. *Usherwood* (3), the County Courts Acts of 1856 and 1867 are different. In the later Act payment and set-off, to have been a defence, must have arisen before action, and so the general words "or otherwise" which follow on these particular words must likewise apply to something that has arisen before

(1) 30 & 31 Vict. c. 142, s. 7: "Where in any action of contract brought or commenced in any of Her Majesty's superior Courts of Common Law the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in the county court or one of the county courts in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly. . . ."

(2) 1 Ex. D. 48.

(3) 3 Ex. D. 1.

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action under the rule by which general words following after particular ones are limited. In the earlier Act there are words of which it cannot be said that they refer exclusively to matters that have happened before action. The same limitation, therefore, does not apply to the general words "or otherwise" in that Act, and I therefore think the decision of the Court below was right.

LINDLEY, L.J. I am of the same opinion. If the words of the County Courts Act, 1856, s. 26, are read in their natural sense the judgment of the Divisional Court is plainly right. There would be no difficulty at all in doing so but for the subsequent Act, and when that is carefully looked at, it appears that there is a different line of thought in it from that in the Act we are now considering. The words "payment into court" are omitted from the later Act; and further, while in the earlier Act the judge is given a discretion to order the cause to be tried in the county court, the subsequent Act says that the judge shall, at the instance of the defendant, remit the action for trial, unless good cause is shewn. It is obvious that, if a defendant had been able to reduce the claim under the later Act by something done after action brought, he could always have forced the plaintiff into the county court. There was good reason, therefore, for altering the words. The cases cited do not apply in the present case, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *R. Greening.*
Solicitors for defendant: *Pyke & Parrott.*

A. M.

BOND, Appellant; EVANS, Respondent.

1888
June 11, 12.

Inn—Offences—Suffering Gaming on Licensed Premises—Knowledge of Servant in charge of Premises—Ignorance of Licensed Person—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance on the part of the licensed person:—

Held, that the licensed person had suffered gaming to be carried on on the premises within the meaning of s. 17 of the Licensing Act, 1872, and was rightly convicted.

Somerset v. *Hart* (12 Q. B. D. 360) distinguished.

Case stated for the opinion of the Court by the stipendiary magistrate at Longton in Staffordshire.

The appellant, a licensed victualler, was charged under s. 17 of the Licensing Act, 1872 (1), with suffering gaming to be carried on on his premises, and was convicted, subject to a case which stated the following facts:—

The appellant's premises consisted of an ordinary inn, alehouse, and victualling house, to which there was a skittle-alley communicating by doors and passages with the rest of the premises.

The appellant had employed one George Owen to manage the skittle-alley, and to attend upon the persons frequenting the same, and Owen had received from the appellant general directions not to permit gambling on the skittle-alley.

On February 23, 1888, two police constables visited the skittle-alley, and upon going inside found some men playing cards for money.

At this time Owen was present in charge of the skittle-alley, and was cognisant of the acts of the men who were playing cards. It was admitted that the appellant was not present, and had had no actual knowledge of the card-playing, and Owen never communicated with him on the subject.

(1) 35 & 36 Vict. c. 94, s. 17, by which, "If any licensed person suffers any gaming or any unlawful game to be carried on on his premises . . . . he shall be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second, and any subsequent offence, 20*l.*"

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The magistrate was of opinion that notwithstanding the decision in *Somerset* v. *Hart* (1), the appellant ought to be convicted, being satisfied that Owen, who had been placed in charge of the skittle-alley, was present and well aware of what was going on and permitted the gaming to take place.

1888. June 11. *Grain*, for the appellant. The conviction cannot be supported. The case distinctly negatives knowledge on the part of the appellant that gaming was carried on, and there is no evidence of connivance, or that he suspected what was going on, and wilfully abstained from ascertaining the truth. These circumstances bring the case within the decisions in *Bosley* v. *Davies* (2), and *Somerset* v. *Hart* (1), on the same section, the latter of which cases is conclusive in favour of the appellant. *Redgate* v. *Haynes* (3) is distinguishable, because the justices were of opinion that the appellant knew that gaming was intended to be carried on, and took pains not to know what her guests were doing. *Newman* v. *Jones* (4), although not a decision on the same statute, is in point, and the principle of that decision ought to govern the present case. It is an unreasonable construction of the statute to say that a man "suffers" a thing to be done, where he is ignorant that it is being done, and has not the means of knowledge, and therefore is powerless to prevent it.

H. D. Greene, Q.C. (*A. T. Lawrence*, with him), for the respondent. The conviction was right. The clause in question (35 & 36 Vict. c. 94, s. 17, sub-s. 1) does not contain the word "knowingly" which occurs in s. 14 and s. 16, sub-s. 1, of the same Act. Where this word is omitted it has been held to be unnecessary to prove knowledge, as in *Mullins* v. *Collins* (5), decided on s. 16, sub-s. 2, and *Cundy* v. *Le Cocq* (6), decided on s. 13. The reasoning in the latter of these two cases applies here, for s. 17 amounts to an absolute prohibition of gaming on licensed premises. *Somerset* v. *Hart* (1) is not in point, because in the present case Owen was in charge of the skittle-alley, which distinguishes his position from that of the potman in *Somerset* v. *Hart*. (1)

(1) 12 Q. B. D. 360.
(2) 1 Q. B. D. 84.
(3) 1 Q. B. D. 89.
(4) 17 Q. B. D. 132.
(5) Law Rep. 9 Q. B. 292.
(6) 13 Q. B. D. 207.

The whole management of the skittle-ground was within the scope of Owen's employment. In *Newman* v. *Jones* (1), which was not a decision on this statute, *Bosley* v. *Davies* (2) and *Redgate* v. *Haynes* (3) do not appear to have been cited.

Grain did not reply.

Cur. adv. vult.

1888. June 12. MANISTY, J. The appellant is this case was convicted under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 17, for suffering gaming to be carried on on his premises. The magistrate before whom he was charged has found the facts to be that gambling took place on the skittle-alley which was attached to the appellant's public-house, and that it took place with the knowledge of the appellant's servant, who was in charge of the skittle-alley, but without the knowledge of the appellant. In this state of circumstances it was contended before the magistrate, on the authority of *Somerset* v. *Hart* (4), that there ought not to be a conviction, and on the argument before us the same decision and that of *Newman* v. *Jones* (1) were relied on for the appellant.

The 17th section of the Licensing Act, 1872, under which the appellant was convicted, is one of a group of sections headed "Offences against public order," and passed for the prevention of such offences. It is important to consider the language of these sections. By s. 13, "If any licensed person permits drunkenness or any violent, quarrelsome, or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person," he is made liable to a penalty. A question arose on that section in the year 1884 in the case of *Cundy* v. *Le Cocq* (5), which I will consider before I deal with the other cases, because it is a decision on the earlier section. The judgment there has an important bearing on the present case because of the reasons given by Stephen, J. He said: "I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a bonâ fide mistake as to the condition of the person served is not an answer

(1) 17 Q. B. D. 132.
(2) 1 Q. B. D. 84.
(3) 1 Q. B. D. 89.
(4) 12 Q. B. D. 360.
(5) 13 Q. B. D. 207.

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to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head 'offences against public order.' Some of these contain the word 'knowingly,' as for instance s. 14, which deals with keeping a disorderly house, and s. 16 which deals with the penalty for harbouring a constable. Knowledge in these and other cases is an element in the offence; but the clause we are considering says nothing about the knowledge of the state of the person served. I believe the reason for making this prohibition absolute was that there must be a great temptation to a publican to sell liquor without regard to the sobriety of the customer, and it was thought right to put upon the publican the responsibility of determining whether his customer is sober." (1) In my opinion the principle of that decision is applicable to the present case, for I think it was intended by s. 17 absolutely to prohibit gaming on licensed premises, and that the substantial effect is that the responsibility is thrown upon any person who keeps a licensed house to take proper precautions to prevent all gaming on his premises.

The only difference between the 13th and the 17th sections is that in s. 13 the word "permits" is used while in s. 17 the word is "suffers," but the word "knowingly" is left out in both sections. In s. 13 the expression used is simply "permits," in s. 14 it is "knowingly permits"; in s. 15 it is "permitting" only, in s. 16, sub-s. 1, it is "knowingly harbours or knowingly suffers to remain," and in s. 17 it is merely "suffers," omitting the word "knowingly." It should also be observed that the word "knowingly" occurred in the repealed statute (9 Geo. 4, c. 61, sched. C), but is omitted from the 17th section of the Act of 1872, which is substituted for that enactment.

Bosley v. *Davies* (2) was a decision upon s. 17, and involved a consideration of the question whether proof of knowledge on the part of the innkeeper was necessary to support a conviction. It is very important to consider the language which was used in dealing with that question. In the course of the argument

(1) 13 Q. B. D. at pp. 209, 210. (2) 1 Q. B. D. 84.

Cockburn, C.J., made this observation: "A man may be said to 'suffer' a thing to be done if it is done through his negligence." (1) The decision was that "The case must be sent back to the justices with an intimation of the opinion of the Court that actual knowledge in the sense of seeing or hearing by the party charged is not necessary, but that there must be some circumstances from which it may be inferred that he or his servants had connived at what was going on. Constructive knowledge will supply the place of actual knowledge." (2)

That decision was followed by *Redgate* v. *Haynes* (3), where the conviction was upheld although no knowledge on the part of the appellant that gaming took place was proved. The judgments there are directly in point with regard to the present case. Blackburn, J., said: "I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not 'suffering' the gaming to be carried on, and if the justices were of a different opinion they were wrong; but I think if she purposely abstained from ascertaining whether gaming was going on or not, or, in other words, connived at it, that this would be enough to make her liable; and I think that where the landlady goes to bed she is still answerable for the conduct of those whom she leaves in charge of the house, and if those persons connive at the gaming, she is responsible." (4) Lush, J., also said: "I agree that it is not necessary that actual knowledge of the gaming should be proved. Sect. 17 says that the owner of licensed premises who 'suffers' gaming shall be liable to a penalty, and I think that connivance on the part of the landlady or the person in charge would be quite sufficient." (5)

It seems to me that those two cases, added to *Cundy* v. *Le Cocq* (6), to which I have already referred, constitute a series of authorities against the appellant's contention, on which we ought to act, and besides this, if there were no authority on the question, I should entertain no doubt as to the object of the statute.

(1) 1 Q. B. D. at p. 87.
(2) 1 Q. B. D. at p. 88.
(3) 1 Q. B. D. 89.
(4) 1 Q. B. D. at p. 94.
(5) 1 Q. B. D. at p. 96.
(6) 13 Q. B. D. 207.

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It remains to consider the cases which were relied on for the appellant.

In *Somerset* v. *Hart* (1) the justices refused to convict, and it was held that they were right, on the ground that there was no evidence to shew any connivance or wilful blindness on the part of the landlord, and it did not appear that the servant was in charge of the premises. In the present case it is distinctly found as a fact that the appellant's servant was in charge of the skittle-alley where the gaming took place. In delivering judgment in *Somerset* v. *Hart* (1), Lord Coleridge, C.J., said: "The only case cited for the appellant which raises any difficulty in my mind is that of *Mullins* v. *Collins* (2), where, however, I observe, the late Mr. Justice Archibald says that he does not intend in any way to interfere with the maxim that before a person can be criminally convicted he must be shewn to have a mens rea. But the true effect of that case may, I think, be summed-up by saying that there the judgment was in affirmance of a conviction." (3) This last observation applies to the present case. Further on the Chief Justice says: "It may be observed, further, that the liquor was served by a woman, as to whom there was, it would appear, some doubt whether she was not the appellant's wife, and, if the magistrates thought she was his wife, and entrusted by him with the management of the house, the case would be brought within the principle of the other cases that have been cited." (4) That is equivalent to saying that if the appellant's wife was engaged in the management of the business the case would come within the decisions in which convictions had been upheld. No doubt, the Chief Justice goes on to say, "The other cases that were cited give me no difficulty, for, as it appears to me, in all of them the judges expressly say that there must be something from which connivance on the part of the licensed victualler may be inferred, at all events to necessitate a conviction. It is nowhere held in those cases that he can be said to suffer gaming where what takes place is not within his knowledge, but merely within that of one of his servants, and

(1) 12 Q. B. D. 360.
(2) Law Rep. 9 Q. B. 292.
(3) 12 Q. B. D. at pp. 362, 363.
(4) 12 Q. B. D. at p. 363.

there is no connivance on his part." (1) The Chief Justice certainly appears to have thought that the connivance of the landlord himself must be inferred in order to justify a conviction, but that is not so, for the other decisions to which I have referred shew that the connivance of the servant in charge of the premises is sufficient. I cannot reconcile the statements contained in this passage with the other decisions.

Newman v. *Jones* (2) was a decision on other statutes. Moreover, it appears from the judgment in that case, that the Court quashed the conviction of the appellants, which had proceeded on the ground that "they were legal owners of the property of the club, and members of the committee" (3), but if the decision was that the appellants were not liable as members of the committee, that was not the question submitted to the Court, for the only question submitted by the case was whether "the appellants as trustees of the club were liable?" (4) In that case also neither *Bosley* v. *Davies* (5), nor *Redgate* v. *Haynes* (6), were adverted to.

If *Somerset* v. *Hart* (7) and *Newman* v. *Jones* (2) militate against the other decisions to which I have referred, I prefer to adhere to the others.

For these reasons I am of opinion that the conviction in the present case was right, and ought to be affirmed.

STEPHEN, J. I am of the same opinion, and I only wish to add a few observations on the cases which have been referred to.

The first case in point of time is *Mullins* v. *Collins* (8) decided in 1874. That was a charge, under s. 16 of the Licensing Act, 1872, of supplying liquor to a constable on duty, and it was held that the publican was liable to be convicted, although the liquor was sold by his servant without his knowledge. There the servant sold the liquor in the ordinary course of business, taking his chance whether the constable was on duty or not, and did not ask, and the conviction was upheld on the ground that the wilful ignorance of the servant made his master responsible.

(1) 12 Q. B. D. at p. 364.
(2) 17 Q. B. D. 132.
(3) 17 Q. B. D. at p. 138.
(4) 17 Q. B. D. at pp. 134, 135.
(5) 1 Q. B. D. 84.
(6) 1 Q. B. D. 89.
(7) 12 Q. B. D. 360.
(8) Law Rep. 9 Q. B. 292.

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In *Bosley* v. *Davies* (1) there was very unsatisfactory proof that anyone knew that gaming was going on, and the case was accordingly remitted to the justices. I think this and all the other cases shew that the prohibition is not quite absolute, but is subject to this limitation, that in order to justify a conviction some one must know of or connive at the gaming.

In *Redgate* v. *Haynes* (2) the justices thought that the landlady had been wilfully blind to what was happening, and that the hall porter had acted in the same way, but it was held by the Court that the connivance of the hall porter, in whose charge the hotel was left, was sufficient to support the conviction.

These two cases shew that the connivance of the servant in charge of the premises is sufficient.

In *Somerset* v. *Hart* (3) the facts were somewhat peculiar That case, unlike the others which have been referred to, was a case where there had been an acquittal by the justices, and moreover the servant who knew of the gaming was only a potman, and was not in charge of the premises, and there had been no delegation of authority to him. This is how I understand *Somerset* v. *Hart* (3), and so understood it does not seem to me to be in conflict with the other decisions. The Chief Justice there distinguishes the case of *Mullins* v. *Collins* (4), where the servant either knew that the constable was on duty or was wilfully blind to that fact. In *Somerset* v. *Hart* (3) the landlord knew nothing, and the potman only knew of the gaming as a fact, but did not come to know it as a part of his business.

In *Cundy* v. *Le Cocq* (5), decided on s. 13, I said that the prohibition against serving a drunken person imposed by that section was absolute. That case no doubt has a bearing on the present case, but I do not attach so much importance to it as Manisty, J., does.

In *Newman* v. *Jones* (6) there is a mistake in the judgment, because *Cundy* v. *Le Cocq* (5) is there spoken of as the case of a charge under s. 16 of selling liquor to a constable on duty, whereas the charge was under s. 13 for selling liquor to a drunken

(1) 1 Q. B. D. 84.
(2) 1 Q. B. D. 89.
(3) 12 Q. B. D. 360.
(4) Law Rep. 9 Q. B. 292.
(5) 13 Q. B. D. 207.
(6) 17 Q. B. D. at p. 138.

person. The error, however, is not one of any considerable importance. *Newman* v. *Jones* (1) is the only decision which made me hesitate at all in the present case, because at first it seemed to me to have been held that there could not be a conviction because the steward had acted contrary to the orders of the appellants. But the trustees of a club are on a different footing from a licensed victualler, who is the proprietor of a house, and the holder of a licence. For these reasons I think that *Newman* v. *Jones* (1) stands on its own circumstances, and is distinguishable from the present case.

In the present case I follow *Bosley* v. *Davies* (2) and *Redgate* v. *Haynes* (3), and without differing from the decision in *Somerset* v. *Hart* (4) I have come to the conclusion that the conviction was right and ought to be affirmed.

I can see no distinction between the word "permits," which is used in some of the other sections, and the word "suffers," which occurs in s. 17.

On general grounds I should entertain no doubt as to the intention of the statute. I think the meaning is that the landlord of licensed premises must prevent that which the Act prohibits from being done on his premises, and if he does not prevent it so much the worse for him. I wish to repeat with regard to s. 17 what I said in *Cundy* v. *Le Cocq* (5) with regard to s. 13, that the statute imposes a prohibition.

Conviction affirmed.

Solicitor for appellant: *Henry Tyrrell, for Tennant, Paine, & Jones, Hanley, Staffordshire.*

Solicitors for respondent: *Thomas White & Sons, for Hand, Blakiston, Everett, & Hand, Hanley, Staffordshire.*

(1) 17 Q. B. D. 132.
(2) 1 Q. B. D. 84.
(3) 1 Q. B. D. 89.
(4) 12 Q. B. D. 360.
(5) 13 Q. B. D. 207.

P. B. H.

1888
June 13.

THE QUEEN *v.* JUSTICES OF THE WEST RIDING.

Inn—Licensing Acts—Renewal of Licence—Conviction—Forfeiture of Licence—Discretion of Justices to refuse Transfer—Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 15—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 15.

A licence existing on May 1, 1869, for the sale of beer to be consumed on the premises was forfeited by the conviction of the holder under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 15, for permitting the premises to be used as a brothel:—

Held, that the licence was not "in force" within the meaning of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, and that the licensing justices at special sessions had a general discretion to refuse applications by the landlord and a new tenant of the premises for a transfer of the licence, and were not limited to the four grounds of refusal specified in s. 8.

RULE calling on the justices of the West Riding to shew cause why a certiorari should not issue to bring up an order made at a special licensing sessions for Halifax refusing to transfer the licence of a beerhouse either to William Pearson Hitchen or John Naylor.

It appeared that one Swaine, who was the holder of a licence under s. 19 of the Wine and Beerhouse Act, 1869, for the sale of beer to be consumed on premises in respect of which a licence was in force on May 1, 1869, and had since been continuously renewed, was summoned before justices under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 15, for permitting his premises to be used as a brothel. Naylor, the owner of the premises, then let them to one Hitchen, and, the necessary notices for a transfer having been given, application was made to the justices at the petty sessions to which Swaine was summoned, for a transfer to Hitchen of the licence under 5 & 6 Vict. c. 44, s. 1.

The justices having been informed of the proceedings against Swaine, adjourned the application for a transfer until they had heard the charge. At the hearing Swaine pleaded guilty, and was fined. The application for a transfer was immediately renewed on behalf of Hitchen, but was refused on the ground that, the licence having been forfeited, the justices had no power to transfer it.

An application was subsequently made at special sessions on behalf of Naylor, the owner of the premises, under 37 & 38 Vict. c. 49, s. 15, and on behalf of Hitchen, under 9 Geo. 4, c. 61, s. 14, for a grant of a licence or transfer licence; but the justices, having before them the conviction of Swaine, determined that the licence was forfeited, and refused the applications.

James Paterson, for the respondent justices, shewed cause. The justices had full discretion to refuse the applications both by the landlord and the new tenant, for although the house was licensed on May 1, 1869, the justices were not restricted to the four grounds of refusal referred to in s. 19, and specified in s. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), because the licence was no longer "in force," having been forfeited together with the Excise licences on the conviction of the holder for permitting the premises to be used as a brothel: 35 & 36 Vict. c. 94 (the Licensing Act, 1872), ss. 15 & 63. Sect. 19 of the Act of 1869 does not apply if the licence has not been continuously kept up by renewal: *Hargreaves* v. *Dawson* (1); *Reg.* v. *Curzon.* (2)

J. L. Walton, for the applicants, in support of the rule. Sect. 19 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), gives the owners of beerhouses licensed at the date of the Act a right to renewal of the licence, which can only be divested by refusal on one of the four grounds specified in s. 8. But the refusal by the justices was not based on any of those grounds. The penalty in s. 15 that "if any licensed person is convicted of permitting his premises to be a brothel, he shall . . . . forfeit his licence, and he shall be disqualified for ever from holding any licence," is personal to the offender, and, no doubt, his licence is gone. But forfeiture by a tenant for such misconduct does not involve forfeiture by the landlord of his right of renewal.

In *Reg.* v. *Curzon* (2) the licence-holder had voluntarily allowed the licence to lapse. That case is, in effect, overruled by the decision in *Reg.* v. *Justices of Liverpool* (3), where a licence having expired a new tenant of the house applied at special sessions

(1) 24 L. T. (N.S.) 428. (2) Law Rep. 8 Q. B. 400.
(3) 11 Q. B. D. 638.

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for a renewal, and the Court of Appeal held that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force, and that the justices had jurisdiction to grant the application.

The Act of 1869, s. 19, enacts that where on May 1, 1869, a licence is "in force" it shall not be lawful to refuse a certificate. A licence was "in force" on that date in respect of the premises. The section does not require that the licence shall be continuously in force down to the date of the application for renewal.

MANISTY, J. I am of opinion that the justices were right. It appears that the premises were licensed on May 1, 1869, and from that date continuously down to the time when the licence was forfeited. Subsequently the holder of the licence was convicted of permitting his premises to be used as a brothel, and forfeited his licence. An application for a transfer or renewal was made to the justices, who refused it, holding that s. 19 of the Wine and Beerhouse Act, 1869, did not apply, because the licence was not "in force," within the meaning of that section. The question is whether they were right in so holding. I am of opinion that they were. I think that it was the intention of the legislature that the discretion of the justices to refuse the renewal when the licensee had forfeited his licence by keeping the house as a brothel should be left unfettered by the provisions of s. 19, which enacts that where on May 1, 1869, a licence is in force with respect to any house for the sale of beer to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate, except upon one or more of the grounds specified in s. 8, none of which, however, apply to the present case. It is reasonable to suppose that in a case like the present the legislature meant to leave the justices free to exercise their discretion, because when the house has been used as a brothel, and the landlord has not interfered, and the tenant has been convicted, and the licence forfeited, such facts surely ought to be taken into consideration. In my opinion, when the case was heard at the special sessions the licence was not then "in force," and the rule must be discharged.

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STEPHEN, J. I am of the same opinion. I place my judgment solely on the ground that s. 19 of the Wine and Beerhouse Act, 1869, does not apply to this case, because, before the applications were made to the special sessions, the licence had been forfeited, and was not "in force."

Rule discharged.

Solicitors for applicants: *Godfrey, Rhodes & Co.*
Solicitors for respondents: *Jaques & Co.*

J. R.

In re WHITAKER.

May 10; *June* 1.

Bankruptcy—Practice—Court Fees—Application by Official Receiver as Trustee —Disclaimer of Property—Different Premises included in one Application —Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 3.

An official receiver when applying to the Court in his capacity of trustee, is not exempt from the fee of 5*s.* prescribed in Table A. to the order of October 25, 1886. The exemption only applies when he makes the application in his capacity of official receiver.

A trustee when applying to the Court under the Bankruptcy Act, 1883, s. 55, sub-s. 3, for leave to disclaim property may include in one application several distinct premises so long as there is one landlord or chief respondent who is affected by the whole application, although there may be other respondents who are only affected by part of it.

IN this case, which was a small bankruptcy, the official receiver was the trustee, and two questions arose which were referred by the registrar to the judge.

The first question was whether the official receiver, when making an application to the Court, not in his capacity of official receiver but as trustee, is exempt from the payment of the prescribed fee of 5*s.*

The second question was whether a trustee, in making an application to disclaim property, may include in one application paper and one notice of motion any number of distinct and different properties and any number of distinct and different respondents, such as landlords, mortgagees, &c., and use one affidavit dealing with all the distinct and different properties.

Sidney Woolf, for the official receiver. Up to the present time

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the Court has required the official receiver, when making an application in his capacity of trustee, to pay the fee of 5*s*. But the words of Table A. of the scale of fees and percentages prescribed by the order of October 25, 1886, are "Every application to the Court, except by the official receiver, 5*s*." The exception contained in these words is general, and there is nothing in the Act or in the rules to limit it. The plain meaning is that all applications made by the official receiver, whether as trustee or otherwise, are exempt. When he acts as trustee he is still acting as official receiver: *Turquand* v. *Board of Trade*. (1)

As to the second point, the practice hitherto has been to allow the trustee to include in one application any number of different properties provided the persons to be served as parties interested are the same; but where the parties interested are different, separate applications have been required. There is, however, no reason why more than one application should be made. Sect. 55, sub-s. 3, of the Bankruptcy Act, 1883, which relates to disclaimer of leases, provides for "notices to be given to persons interested," shewing that there may be several respondents to one application. In this case only the few last days of different leasehold terms are vested in the official receiver as trustee. There is no beneficial interest. All the leases are mortgaged by sub-demise, and if separate applications are to be made and fees paid, the expense to the estate will be unreasonable.

Cur. adv. vult.

1888. June 1. CAVE, J., delivered judgment as follows. The first point I have to decide is, whether the official receiver is exempt from the payment of the prescribed fee of 5*s*. where he makes the application as trustee and not as official receiver.

Table A. of the scale of fees and percentages contains the following: "Every application to the Court, except by the official receiver, 5*s*." In my judgment the exemption only applies when the official receiver makes the application as official receiver, and not when he makes the application as trustee. There are, I think, good grounds for the distinction. Where the official receiver makes an application as trustee he is as a general rule in posses-

(1) 11 App. Cas. 286.

sion of the assets in the bankruptcy, and there seems no sufficient reason why a particular estate should be exempted from the fee when the application is made by the official receiver in his capacity as trustee, and be compelled to pay the fee when a similar application is made by a trustee appointed by the creditors. These fees are applied in paying the salaries of the officials and other expenses of working the Bankruptcy Act, and I can see no reason why a particular estate should be exempted from its share of the burden where an application is made by the official receiver in his capacity of trustee. It may be said that there are cases, especially in the administration of small estates, where there are no available assets for the payment of these fees. Such cases can only occur very seldom, and when they do occur the fees will in fact be payable out of the moneys applicable to paying the expenses of the Act, which seems a far more reasonable course than that in all cases, whether there are assets or not, an estate should be exempt from these fees so long as the official receiver is acting as trustee. Moreover, rule 318, which was made at the time when the table of fees was sanctioned, provides that the trustee shall, before the estate is handed over to him by the official receiver, discharge any balance due to the official receiver on account of fees, costs, and charges properly incurred by him and payable under the Act. The words "except by the official receiver" appear to me to have a sufficient meaning given to them if they are confined to applications made by the official receiver to the Court as official receiver, such as applications under rule 334, or under rule 339 (4), or the like.

The second question is, in effect, what is an application? Primarily an application connotes a respondent, against whom the application is made, and an application does not cease to be one because there are more respondents than one who are affected by the whole of the application. Nor do I think it ceases to be one application because there are respondents who are interested in part of the application only, provided there is also a chief respondent who is interested in the whole. But when there is no longer any chief respondent who is interested in the whole application, but only some respondents who are interested in one part and some who are interested in another part, then I

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think the character of unity is gone, and the application is no longer one.

I answer, therefore, that so long as there is some one chief respondent who is affected by the whole application, the application is one, and one fee only is payable, although there may be many other respondents, some of whom are concerned as to part only and others as to other parts only; but that, as soon as there is no chief respondent who is sought to be affected by the whole of the application, then the application is double, and should not be allowed to be made in that form.

Apply this principle to an application to disclaim. I think the landlord is the chief respondent, and that on an application against one landlord, whether individual, partners, or company, any number of mortgagees or sub-lessees who are interested in parts only of the property sought to be disclaimed may be joined, but that different landlords of separate and distinct estates cannot be joined as respondents to one application for leave to disclaim the aggregate property.

Solicitors: *Valpy, Chaplin, & Peckham.*

H. L. F.

June 23.

[IN THE COURT OF APPEAL.]

IN RE ARMSTRONG. EX PARTE BOYD AND ANOTHER.

Bankruptcy—Married Woman—Trade carried on separately from Husband—Separate Property—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5, *s.* 19.

Real property was by a marriage settlement vested in a trustee in trust for a married woman for life for her separate use without restriction on anticipation, with remainder to such persons as she might appoint, with remainder in default of appointment. The married woman carried on a trade separately from her husband and became bankrupt:—

Held (by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting), that the trustee in bankruptcy in claiming the life estate was not interfering with or affecting the settlement within s. 19 of the Married Women's Property Act, 1882, and that it passed to him under the bankruptcy under s. 1, sub-s. 5, of the Act.

APPEAL from an order made by a Divisional Court (Cave and A. L. Smith, JJ.) reversing an order of the judge of the Brentford County Court.

The bankrupt was a married woman who had carried on a trade

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separately from her husband. Previously to her marriage in 1881 she had executed a marriage settlement by which she conveyed freehold property, which consisted of certain houses, to a trustee on trust to pay the rents and profits to her during her life, without impeachment of waste, for her sole and separate use, without any restriction on anticipation, and after her decease, upon trust for such person or persons, for such estate or estates, interest or interests, and generally in such manner as she should, whether covert or sole, by deed or will appoint, with remainder in default of appointment. On her bankruptcy the trustee in bankruptcy received the rents of the houses, and an application was made to the judge of the Brentford County Court on behalf of the bankrupt for an order directing the trustee in bankruptcy to pay over to the bankrupt the amount in his hands.

The county court judge made the order as prayed.

The case came on appeal before Cave and A. L. Smith, JJ., who were of opinion that they were bound by the judgments of the Divisional Court in *In re Armstrong, Ex parte Gilchrist* (1), which came before the Court of Appeal (2) and was reversed, but on a different ground. They accordingly reversed the decision of the county court judge, but gave leave to appeal.

1888. June 9. *T. Ribton*, for the bankrupt. The question is, what is the effect of sect. 19 of the Married Women's Property Act, 1882. (3) In *In re Armstrong, Ex parte Gilchrist* (1) the point

(1) 17 Q. B. D. 167.

(2) 17 Q. B. D. 521.

(3) Sect. 1, sub-s. 5: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole."

Sect. 19: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

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was raised and decided by the Divisional Court, but the Court of Appeal decided the case on a different ground, and though they reversed the decision of the Divisional Court (1) they expressed no opinion upon the point which now arises. On the present occasion the Divisional Court considered that they were bound by the opinion which they had previously expressed.

Before the Married Women's Property Act, 1882, a married woman could not be made a bankrupt except by virtue of some special custom, such as the custom of the city of London: *Ex parte Jones.* (2) But now, by virtue of sub-s. 5 of s. 1 of the Act of 1882, there can be in the case of a married woman who carries on a separate trade a qualified bankruptcy, i.e., a bankruptcy in respect of her separate estate. In the present case the settlement which created the separate estate was executed before the Act of 1882 came into operation, and the effect of s. 19 is to exclude her settled property from the operation of the Act altogether; the married woman is not a bankrupt so far as that property is concerned. The exceptions contained in the latter part of s. 19 throw light on the previous enacting part of the section; they shew what, but for the exceptions, would have been within the previous enactment. The exceptions deal only with the claims of creditors as against settlements made after the Act; the Act is not to apply at all to settlements made before its commencement: *Smith* v. *Whitlock.* (3) The trustee in the bankruptcy is entitled to such separate property as the married woman acquires by virtue of the Act of 1882, but that which she acquires by virtue of a settlement made before the Act is excluded. The protection given by s. 19 is not confined to the claims of beneficiaries inter se: *Beckett* v. *Tasker.* (4) That the Act does not apply to property comprised in a settlement made before the commencement of the Act is shewn by *In re Stonor's Trusts* (5); *In re Whitaker.* (6)

Even assuming that the property might be available for creditors suing individually, it does not follow that it is subject to the jurisdiction of the Bankruptcy Court, which is entirely the

(1) 17 Q. B. D. 521.
(2) 12 Ch. D. 484.
(3) 34 W. R. 414.
(4) 19 Q. B. D. 7.
(5) 24 Ch. D. 195.
(6) 34 Ch. D. 227.

creation of statute. In substance the county court judge held that sitting in bankruptcy he had no jurisdiction over the property, and therefore ordered its restoration by the officer of the court.

Yate Lee, for the trustee. The words of s. 1, sub-s. 5, are: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." This relates to all her property, because a married woman has no property that is not "separate property." The question is what limitation s. 19 imposes on this. It would be strange if a married woman could make a settlement of property on herself, with power to charge, assign, or deal with it, and yet might by becoming bankrupt escape from paying her creditors while she retained her property. A married woman with such a power does not interfere with or affect the settlement when she assigns her interest in it, nor does an assignment by operation of law do so. The trustee in this case is affirming the settlement and claiming under it. He is not seeking to affect the settlement, but the settled property. The right interpretation of s. 19 is that, where any property would, but for the Act, come into settlement, it is still to do so, subject to any restriction against anticipation which the settlement may contain. *In re Whitaker* (1) is an example of this. If s. 19 excludes the settlement in this case altogether from the operation of the Act, there could be no reason for inserting the provision that prevents restraint against anticipation from becoming inoperative, for such restraint is merely an appanage of separate estate. If the argument on the other side is right, s. 19 must be read as if it excepted entirely from the Act all marriage settlements; but why should property settled under a will be available for creditors, and not property under a settlement? If s. 19 restricts the operation of the Act as suggested, the form of judgment against a married woman given in *Scott* v. *Morley* (2) is too wide, and ought to contain words excepting property coming under a settlement made before or after marriage. The general result of the Act is that while a married woman is to hold property as if she

(1) 34 Ch. D. 227. (2) 20 Q. B. D. at p. 132.

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were a feme sole, all her property over which she has control is to be subject to the bankruptcy laws, if she carries on a trade separately from her husband.

T. Ribton, in reply, referred to *Hancock* v. *Hancock*. (1)

Cur. adv. vult.

1888. June 23. LORD ESHER, M.R. In this case the bankrupt is a married woman who settled certain property under her marriage settlement, and after she was married carried on a trade separately from her husband. She has been made bankrupt in respect of the trade so carried on, and the trustee in the bankruptcy claims to be entitled to receive and distribute among the creditors a portion of the settled property. The question whether he is so entitled depends on the true construction of s. 19 of the Married Women's Property Act, 1882.

It would not be right to suppose that the legislature when they passed this Act did not understand it, but unquestionably its construction by the Courts presents the most serious difficulties. There appears to have been an effort to reconcile two things, the desire to protect and preserve to her the property of a married woman, and the desire to make her responsible for her debts. I doubt whether the Act was really intended to protect persons of large means, but rather to protect persons of limited means, who, by their own exertion and talents obtained property which might be taken by a husband and used for his own purposes. That seems to me to be the general idea and object of the Act. Such a case would not be one of a marriage settlement with clauses against anticipation or other clauses introduced by conveyancers for the preservation of the property. So I should expect that in an Act intended to protect the property of married women care would be taken not to take away the protection intended to be given merely because a settlement does not contain such clauses. It is fair that if a woman has made money by business and then fails, that she should be responsible, and I can understand the legislature saying that in such a case everything but the settled property should go to the creditors. It is impossible not to see

(1) 38 Ch. D. 78.

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that the wording of the Act raises very great difficulties of construction, but the substance is, that though a man can be made bankrupt whether he carries on trade or not, a woman can only be made bankrupt if she carries on trade separately; so this is a limited liability to bankruptcy, and the liability to her creditors is only in respect of her separate property. Looking at it in this light, what can be more natural than that in this limited bankruptcy something should be saved to the woman, and that that something should be her settled property? To say that a settlement is not interfered with or affected when its effect is destroyed, and every advantage that could be obtained under it is taken away, is so fine a point that I cannot appreciate it. I think to interfere with a thing includes taking away or destroying its ordinary, natural and obvious result. If property is in settlement and yet can be made subject to the bankruptcy of the person on whom it is settled, which would not have been the case before the Act, the settlement is, in my opinion, interfered with. I think it is clear that s. 19 refers to marriage settlements. Every part of the section seems to me to support this view, and I agree therefore with the argument on behalf of the bankrupt that s. 19 excludes marriage settlements from the operation of the Act, and that the trustee therefore has no title to the settled property. In my opinion therefore the judgment appealed from should be reversed.

LINDLEY, L.J., read the following judgment. The question in this case turns on the construction of s. 19 of the Married Women's Property Act, 1882, taken in connection with s. 1, cl. 5, of the same Act.

Mrs. Armstrong carried on a trade separately from her husband and thereby became, in respect of her separate property, subject to the bankruptcy laws as if she were a feme sole (Married Women's Property Act, 1882, s. 1, cl. 5). She committed an act of bankruptcy, and was thereupon adjudicated bankrupt. But, as decided by this Court in *In re Armstrong, Ex parte Gilchrist* (1), her bankruptcy only affected her separate property, and did not affect property over which she had only a power of appointment,

(1) 17 Q. B. D. 521.

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and which, in default of appointment, would belong to other people.

On her marriage in 1881 some property was settled on her for life, for her separate use, with remainders over. There was no clause in the settlement restraining her from anticipation.

The question now arises whether this life estate has passed to her trustee in bankruptcy, or whether she is entitled to enjoy it notwithstanding her bankruptcy. The trustee claims it under the Bankruptcy Act, and he is entitled to it under that Act unless his title is excluded by s. 19 of the Married Women's Property Act, 1882. It is contended for Mrs. Armstrong that if it had not been for s. 1, cl. 5, of the Married Women's Property Act, the trustee could not have claimed her life interest, and that his claim thereto being based on that section, is one to which effect cannot be given without interfering with or affecting her settlement, contrary to s. 19. It was further contended on her behalf that the effect of s. 19 is to render it necessary to distinguish separate property to which a married woman is or becomes entitled under some settlement or agreement for a settlement, and separate property to which she is or becomes entitled in some other way; and that whilst s. 1, cl. 5, applies to a married woman's unsettled separate property, it does not apply to separate property which she takes under a settlement.

If the Act is examined it will be seen that it not only makes that to be separate property which was not so before in the absence of some agreement or trust to that effect, but the Act also annexes to separate property consequences which were not before incident to it, or not incident to it to the same extent as under the Act, e.g., s. 1, cl. (3) and (4). In extending the rights of married women, care has also been taken to protect their creditors, and in some cases to extend their rights against the separate property of married women with whom they have dealt.

Now it will be observed that s. 19 does not say that nothing in the Act shall interfere with or affect the incidents annexed by the Act to separate estate, or the consequences which follow its creation; the s. 19 refers in the early part of it to settlements, and the words "interfere with or affect any settlement" mean invalidate or render inoperative any settlement. Settlements

creating separate estate are to have the same effect as if the Act had not passed, and so read the section is an important proviso on s. 2 and on s. 5. In this case the trustee is claiming under the settlement not against it; he is not interfering with or affecting it. He claims the life estate created by it because the married woman entitled to that life estate has done an act which amounts in point of law to an alienation of it. It is true that but for the Act she could not have been made bankrupt or could not have aliened her life estate in the particular mode in which she has done so. But no alienation of her life estate, be it voluntary or be it involuntary, is an interference with the settlement, nor does such alienation affect it.

The second clause of s. 19 shews that interfering with a settlement means something different from affecting an estate created by it. The second clause would not be wanted if the construction contended for were correct.

Mr. Ribton's argument is in truth open to the objection that it proves too much. Considering that by far the largest portion of separate property is created by settlement, and that his argument if acceded to would take all separate property so created out of the operation of the Act, the consequence would be that the Act would have left the old law to apply to settled separate property, and the new to unsettled separate property. Such a construction of the Act would not only lead to the utmost confusion, but would be destructive of one of the main objects of the Act, which was to extend to all married women having separate estate and to their creditors the rights enumerated in the various sections. I can find no warrant for drawing any distinction between separate property acquired by settlement and separate property otherwise acquired, as regards the consequences attaching to it when acquired. To draw such a distinction would not be to give effect to the statute, but practically to destroy its operation to a very great and, in my opinion, very alarming extent.

I may add that in my judgment s. 19 applies to all settlements, whether made before or after marriage, and is not confined to what are popularly called marriage settlements, such as that made in this case.

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The appeal ought to be dismissed.

LOPES, L.J., read the following judgment. I agree with the judgment of Lindley, L.J., and cannot agree with the judgment of the Master of the Rolls.

Mrs. Armstrong (the bankrupt), under the settlement, was entitled to the rents and profits of the houses during her life for her separate use, but expressly without any restraint on anticipation. A power is given to her to appoint the property by deed or will to such persons, for such estates, as she shall think fit. Subject to that, the trustee is to hold the property for the benefit of the only child by a previous marriage, and the children of the intended marriage. There are other powers. The Court has now to deal only with the life interest of the bankrupt.

The question is whether the life interest of the bankrupt in these houses is available for the benefit of her creditors as being her separate property within sub-s. 5 of s. 1 of the Married Women's Property Act, 1882.

No restraint on anticipation being imposed, the bankrupt has an absolute power of disposition in respect of the life estate. That the life estate is in the circumstances of this case separate property, and subject to the bankruptcy laws, is beyond question, unless it can be brought within s. 19 of the same Act.

There being no restriction against anticipation, the words of s. 19 applicable are "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman." It is contended that this limits the meaning of the words "separate property," in sub-s. 5 of s. 1, and makes those words applicable only to unsettled as distinguished from settled separate property, in fact excluding from the operation of s. 1, sub-s. 5, all separate property which is settled, although the married woman has absolute power of disposing of it inter vivos or by will, in the same way as a feme sole.

It would require strong and unequivocal language to qualify such a construction. The legislature, in my opinion, contemplated nothing so unreasonable. All that is intended is that the

provisions of settlements are not to be invalidated by the Act. It is an interference with the provisions of the settlements, not an interference with settled property under settlements over which the married woman has absolute control, that is contemplated. If the trustee here were claiming in derogation of the provisions of the settlement, I could understand Mr. Ribton's contention, but he is really claiming under and in affirmance of its provisions, claiming in the same way as any other alienee to whom the life interest was conveyed, the only difference being that the alienation here is the act of the law, and not the voluntary act of the party.

I am of opinion, therefore, that the life interest of the bankrupt in these houses is her separate property within sub-s. 5 of s. 1, and that s. 19 does not prevent that sub-section from applying.

Appeal dismissed.

Solicitors for the trustee: *J. A. & H. E. Farnfield.*
Solicitors for the bankrupt: *Woodbridge & Sons.*

A. M.

[IN THE COURT OF APPEAL.]

June 26.

THE GRAND JUNCTION CANAL COMPANY *v.* PETTY AND OTHERS.

Highway—Dedication, Power to make—Land vested in Company for Statutory Purposes.

Land acquired by a company under an Act of Parliament for the purposes of their undertaking as specified by such Act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the Act.

Therefore, where land was acquired and used by a canal company under their statutes for the purposes of a towing-path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing-path by the company:—

Held (affirming the decision of the Queen's Bench Division) that the company could dedicate the land as a public footpath subject to its use by them as a towing-path.

R. v. *Leake* (5 B. & Ad. 469) approved and followed.

APPEAL from the order of the Queen's Bench Division, refusing an application for a new trial or to enter judgment for the plaintiffs.

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The facts were, so far as material, as follows:—

The action, which was tried before Pollock, B., with a jury, was for trespasses upon a portion of one of the plaintiffs' towing-paths. The defence was that the towing-path at the place in question was a public footpath, and that the alleged trespasses were in the exercise by the defendants of the public right of way along the towing-path. The plaintiffs were a canal company, and were authorized by their Acts of Parliament to acquire land by agreement or compulsorily for the purpose of making certain canals and towing-paths. They had accordingly acquired the locus in quo, and used the same for the purpose of a towing-path under their statutory powers. Evidence was given shewing user of the towing-path as a footway by the public during a long period of time. The plaintiffs contended (inter alia) that they had no power to dedicate. The question whether there had been a dedication by the plaintiffs being left to the jury by the learned judge, the jury found that there had been such a dedication. No evidence appeared to have been given, nor did it appear to have been suggested, that the use of the towing-path as a footpath by the public was in any way inconsistent with its use by the plaintiffs for the purposes specified in their Acts of Parliament. The learned judge entered judgment for the defendants upon the finding of the jury. Application was made to the Queen's Bench Division on behalf of the plaintiffs for a new trial on the ground of misdirection, or to enter judgment for the plaintiffs for nominal damages. The Divisional Court (Lord Coleridge, L.C.J., and Mathew, J.) refused the application.

W. Graham, and *Etherington Smith*, for the plaintiffs. Where a statute authorizes a company to take land compulsorily and to hold it for specific purposes, they cannot apply it to other purposes; and it follows that they cannot dedicate it to the public as a highway: *Mulliner* v. *Midland Ry. Co.* (1) Where land is taken from owners compulsorily, the compensation is assessed on the footing that it is taken for the statutory purposes, and it would be unfair that the company should be able to dedicate it to other purposes which might prejudice the adjoining land more

(1) 11 Ch. D. 611.

than the statutory purposes. It may be quite true that the use of the land as a highway is not inconsistent with its use for the purposes for which the company at present require it, but how is it possible to say that it may not be inconsistent with purposes for which the company may in future require to use the land? They also cited *Rex* v. *Leake* (1); *Grand Surrey Canal Co.* v. *Hall* (2); *Bostock* v. *North Staffordshire Ry. Co.* (3)

Hammond Chambers, for the defendants. The use of the land as a footpath is not shewn to be inconsistent with any purposes for which the company at present have power or require to use it. If the company should in the future require to use this land for other purposes than those for which they can now use it, they would have to get further statutory powers, and Parliament could then deal with the public right of way. [He was then stopped by the Court.]

LORD ESHER, M.R. The contention is that, assuming there was a dedication in this case, such dedication could not legally be made by the company. I do not think there is any real inconsistency between the cases that have been cited on this point. I do not think that the late Master of the Rolls in deciding *Mulliner* v. *Midland Ry. Co.* (4) meant to decide anything in contravention of what was decided in *R.* v. *Leake.* (1) On the contrary it seems to me that what he decided was quite in accordance with that case, but I think that he was of opinion that the facts of the case with which he was dealing pointed to a different conclusion of fact from that on which the decision in *R.* v. *Leake* (1) was founded. I cannot see that he questioned in any way the principle laid down by Parke, J., in that case. I adopt what that learned judge there laid down. (5) He said: "If the land was vested by the Act of Parliament in Commissioners so that they were thereby bound to use it for some special purposes incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it: but if such use by the

(1) 5 B. & Ad. 469.
(2) 1 M. & G. 392.
(3) 4 E. & B. 798.
(4) 11 Ch. D. 611.
(5) 5 B. & Ad. 478.

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public be not incompatible with the objects prescribed by the Act, then I think it clear that the Commissioners have that power." In this case the counsel for the plaintiffs argued, in contravention of the principle so laid down, that, even although the use of this towing-path by the public as a footpath be not inconsistent with the purposes for which the company hold the land, yet the company cannot dedicate. It was never suggested that the walking of the public along the towing-path was inconsistent with its use by the company as a towing-path. No evidence was given by the plaintiffs that it was so, and it was never even argued that it was. The case was argued on the assumption that it was not. We are therefore not troubled in this case with the question whether there would be power to dedicate if the use by the public were inconsistent with the purposes of the company. In such case a different question might arise. I think, therefore, that the case comes within the principle laid down in *R.* v. *Leake* (1), and that the company could legally make the dedication. That such a dedication is to be taken to be an absolute dedication without limitation I cannot suppose. It must be, I think, a dedication to the public of the towing-path, for the purpose of such user as a footpath as will not interfere with its ordinary use as a towing-path by the company. I do not think that the public walking on the towing-path are entitled to say that the towing must be regulated with reference to their convenience. The public in accepting the dedication must be taken to accept it as a limited dedication, and cannot set up a right to prevent or limit the user of the towing-path by the company. If the horse or the tow-rope and the foot-passenger are in one another's way, the foot-passenger must look out for himself and get out of the way. For these reasons I think the decision of the Court below was correct, and this appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. The point raised is that the plaintiffs, being a canal company existing for certain statutory purposes, are incapacitated from dedicating their towing-path. The question is whether that proposition can be maintained. There was no evidence whatever that in point of

(1) 1 B. & Ad. 469.

fact the dedication was inconsistent with the purposes for which the land was acquired by the company. If that case had been raised at the trial the jury would have settled it, and, if they had found that there was any such inconsistency, a different question would have arisen. There is no such finding, and no evidence that would warrant the inference that there was any such inconsistency. Then can we say under those circumstances, as a matter of law, that the company cannot dedicate? The plaintiffs' counsel answered in the affirmative and contended that the case was governed by *Mulliner* v. *Midland Ry. Co.* (1), in which the late Master of the Rolls held that the company could treat as invalid a grant made by itself of a right of way under an arch supporting its railway. But he was clearly of opinion in that case that the existence of such right of way was inconsistent with the statutory purposes for which the company had purchased and required the land. I do not think that case governs this, because there is no evidence to that effect in the present case. The contention for the plaintiffs must practically go the length of saying that no towing-path in the country can be dedicated. Is there any authority for such a proposition? No doctrine by which it could be sustained was laid down in *Mulliner* v. *Midland Ry. Co.* (1), and it does not appear to be consistent with what was said in *Rex* v. *Leake* (2), which though it related to the case of a drainage embankment seems to turn on considerations equally applicable to a towing-path. The true principle appears to me to be laid down in the judgment of Parke, J., in that case. Applying that principle here, we have no materials for saying that the dedication was inconsistent with the use by the company of the towing-path as such.

LOPES, L.J. The question appears to be whether a public right of way can be acquired as against a statutory corporation which has acquired the land over which such right of way is claimed under their statutes for the purposes therein contemplated; or in other words, can a corporation so circumstanced dedicate? I am of opinion that it can dedicate to a limited extent; by which I mean to the extent of conferring on the

(1) 11 Ch. D. 611. (2) 5 B. & Ad. 469.

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public such a right as is not incompatible with the purposes for which the company has acquired the land. Applying that proposition to the present case, no evidence seems to have been given that the right of way exercised by the public was in any way inconsistent with the purposes for which the company had acquired the land, and, if I am not mistaken, no such point was ever taken. So that we have to consider this case quite apart from the question whether there could be a dedication where there was such an inconsistency. That being so, I think the company had power to dedicate to the limited extent I have mentioned; and it seems to me that in so deciding we are acting in accordance with *R.* v. *Leake* (1), and, for the reasons already mentioned, I do not think that we are deciding anything inconsistent with the judgment in *Mulliner* v. *Midland Ry. Co.* (2) On these grounds I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Field, Roscoe & Co.*

Solicitors for defendants: *Letts Brothers*, for *Parker & Wilkins.*

E. L.

July 5.

[IN THE COURT OF APPEAL.]

THE GUARDIANS OF THE MEDWAY UNION, APPELLANTS; THE GUARDIANS OF THE BEDMINSTER UNION, RESPONDENTS.

Poor Law—Settlement—Residence as Wife and Widow—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.

A pauper had resided with her husband in a parish continuously for upwards of three years and continued after her husband's death to reside as a widow in the same parish for three months:—

Held, affirming the judgment of the Queen's Bench Division, that the pauper had by such residence gained a settlement in the parish under s. 34 of the Divided Parishes Act, 1876.

By Lord Esher, M.R., and Lindley, L.J., Lopes, L.J. dissenting as to the construction of s. 34.

APPEAL from the judgment of the Queen's Bench Division (3), upon a special case stated from Bristol quarter sessions upon

(1) 5 B. & Ad. 469. (2) 11 Ch. D. 611.

(3) 20 Q. B. D. 191.

an appeal against an order for the removal of Caroline Baker, widow, with her three children, aged respectively five, three, and two years, to the appellants' union as the place of her last legal settlement.

The facts were as follows: The pauper and her husband had resided together continuously in the parish of Gillingham in the appellants' union for upwards of three years immediately before the death of the husband, which took place in March, 1886, and she continued to reside as a widow for three months after his death in the said parish. (1)

The recorder held that the pauper had acquired a settlement in the parish of Gillingham under s. 34 of the Divided Parishes Act, 1876, and accordingly confirmed the order of removal.

The Divisional Court (Pollock, B., and Hawkins, J.) upheld his decision.

Sir E. Clarke, S.G., and *Kinglake* (*Douglas Metcalfe* with them), for the appellants. The pauper has not acquired a settlement in the appellants' union under s. 34 of the Divided Parishes Act, 1876. The words "any person" in the section must mean any person sui juris, and do not therefore include a woman under coverture or an unemancipated child: *Guardians of Highworth* v. *Guardians of Westbury*. (2) A woman cannot acquire a settlement or a status of irremoveability in her own right by residence during her husband's lifetime. His settlement is her settlement, and her removeability or irremoveability depends on his: *Reg.* v. *Overseers of Manchester*. (3) The husband by his residence was acquiring a settlement in the parish which, while she was his wife, she would take. His residence is in law hers, and a break in his residence would be a break in hers: and it would be an anomaly that by such residence she should be acquiring a settlement on her own account at the same time as he was acquiring a settle-

(1) It will be observed that the period of residence is stated somewhat differently in the report below, but it was sufficient for the purposes of the judgment there to shew a period of three years' residence as wife and widow, whereas in the Court of Appeal some of the observations in the judgments render it necessary to allude to the fact that there was a residence of three years during the husband's lifetime.

(2) 20 Q. B. D. 597.

(3) 8 Q. B. D. 50.

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ment which she would derive from him. It is clear that the pauper could not take a derivative settlement from her husband at the time of the order of removal, because it has been held under s. 35 that "wife" does not include "widow": *Maidstone Union* v. *Holborn Union* (1); *Croydon Union* v. *Reigate Union.* (2) They also cited *Dorchester Union* v. *Poplar Union* (3); *Reg.* v. *St. Ebbs.* (4)

Poole, Q.C. (*J. Cresswell Wall,* with him), for the respondents. The pauper did in fact reside in the parish for more than three years during the husband's lifetime and three months after his death: and she so resided in that period as to be irremoveable: she therefore comes within the words of s. 34. There is no reason why she should not, though holding his settlement during his life, be acquiring a settlement by residence to take effect after his death when she loses his settlement. *Reg.* v. *Glossop* (5) decided that the wife's residence during her husband's lifetime is to be taken into account for the purpose of conferring on her a status of irremoveability. That case is a direct authority in favour of the respondents, for what s. 34 does is to convert the status of irremoveability into a settlement where there has been a certain period of residence; and therefore whether there is such residence as would confer irremoveability is really the test. *Reg.* v. *St. George's-in-the-East* (6), followed *Reg.* v. *Glossop* (5), and there are other cases to the same effect.

Kinglake, in reply.

LORD ESHER, M.R. I see no answer to the reasoning of Pollock, B., in the court below. I do not think that this question is the same as any of the questions that have come before us hitherto, or that it turns on any of the points decided under s. 35. It is not a case of derivative settlement. The question is, in my opinion, whether this woman, without regard to any right derived from her husband, was in such a position at the time when the question arose as to her settlement as to be within the terms of s. 34. That section appears to me to provide

(1) 17 Q. B. D. 817.
(2) 19 Q. B. D. 385.
(3) 21 Q. B. D. 88.
(4) 12 Q. B. 137.
(5) 12 Q. B. 117.
(6) Law Rep. 5 Q. B. 364.

that, if certain conditions are fulfilled in the case of "any person," that person shall be deemed to be settled in the parish. Then were those conditions fulfilled in this case? This person did, in fact, reside in the parish of Gillingham for more than three years. To begin with, she resided there with her husband for more than three years. Is that a residence which can be taken into account in determining whether she had become irremoveable? *Reg.* v. *Glossop* (1) decides that it can, and there appear to be several other cases which decide that, in calculating the period of residence which is to confer irremoveability, the time during which a person has resided as a wife with her husband may be taken into account. Whether the time could be taken into account during which a wife resided in a parish apart from her husband is a question which may have to be decided in future, but it does not arise in this case. Where the wife resided with the husband, and therefore her actual residence and her residence in contemplation of law coincided, it has been held that such residence can be taken into account in ascertaining whether she has become irremoveable. During the period previous to the death of the husband, this woman resided in the parish, both in fact and in law, and she resided under such circumstances as to be irremoveable. Then, again, after the husband's death, she continued to reside in the same parish for three months; and of course during that period her actual residence and her residence in contemplation of law coincided. And during that period she would be irremoveable, for she could not in any case be removed for a year after his death. Therefore, during the whole period of more than three years prior to the time when the question as to her settlement arose, she did reside both in fact and in law in the parish of Gillingham, and during that time she resided in such a manner as to be irremoveable. It therefore appears to me that she did reside in the parish for the term of three years in such manner and under such circumstances in each of such years as would render her irremoveable, and therefore had fulfilled the conditions mentioned in s. 34. For these reasons I think the decision of the Court below was correct, and should be affirmed.

(1) 12 Q. B. 117.

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LINDLEY, L.J. I have felt some doubt during the argument, but in the result I have come to the conclusion that the case is brought within the terms of s. 34. A wife could not before and cannot after this Act acquire a settlement separate from that of her husband. Her settlement and status of removeability or irremoveability depend on his. But at the same time, if she does reside with her husband in a parish from which such residence of the husband renders him irremoveable, she does reside in such a manner as to render her irremoveable, not by reason of her own residence only, but because she resides there with him, and his irremoveability becomes hers. Sect. 34 provides that, where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the statutes in that behalf render him irremoveable, "he shall be deemed to be settled therein." The husband, as I understand, had fulfilled the terms of the section, and so I think has the wife, not by reason of her own residence only, but because she was his wife actually residing with him, and so residing was irremoveable in consequence of his irremoveability. I do not say that the section would apply to the wife's residence where a wife was living apart from her husband, and so her actual residence was not the same as his. But, when you have the conjoint circumstances of his and her residence and his and her irremoveability, then it appears to me that the section is applicable. In this case it should be observed that the pauper had resided for more than three years before the husband's death, so that the question whether the period of residence after his death can be tacked to the residence before does not really arise. For these reasons I think the case came within s. 34, and it does not appear to me that any of the difficulties which arise under s. 35 apply to this case.

LOPES, L.J. I am unable to agree with the decision of my learned Brothers with regard to the construction of s. 34. Unfortunately we have in this case to construe s. 34 without reference to s. 35, because there has been a decision of this Court upon s. 35 which appears to me to prevent me from applying to s. 34 a construction which I should otherwise have applied. To my

mind the important question is as to the meaning of the words "any person" in s. 34. I think that they mean persons sui juris who are capable of acquiring a settlement or status of irremoveability for themselves, and that they do not include unemancipated children or women under coverture, cases otherwise provided for in the Act. While the husband lives, I think that his residence only and not the wife's must be looked to, and his status of irremoveability, not hers. It is not the residence of the wife which renders her irremoveable, it is the residence of the husband. During his life she cannot, I think, do anything to acquire a status of irremoveability in her own right, or a settlement, but her status and settlement follow and change with his. I think, therefore, that she is incapable of fulfilling the conditions of the 34th section. It appears to me that the construction which the Court below put upon the section ignores the law with regard to acquiring settlements as it existed previous to the passing of the Act.

With regard to the case of *Croydon Union* v. *Reigate Union* (1), where it was held that the word "wife" in s. 35 does not include a widow, all I can say is that I loyally bow to that decision; but I feel bound to say that it puts a construction on the section which, if the matter had been res integra, I myself should not have put upon it. I feel justified in making these observations, because I understand that that case is going to the House of Lords. If I had been free to construe s. 35 with s. 34 I should have held that the wife acquired a derivative settlement from her husband under s. 35. While therefore I should have differed from the reasoning of the Court below, I should have arrived at the same result in another way.

Appeal dismissed.

Solicitors for appellants: *Prall & Son.*

Solicitors for respondents: *O. Donoghue & Anson.*

(1) 19 Q. B. D. 385.

E. L.

1888
May 18.

BOALER *v.* THE QUEEN.

Criminal Law—Libel—Indictment for publishing Libel "knowing the same to be false"—Conviction for Publication only—6 & 7 Vict. c. 96, ss. 4, 5.

On an indictment for publishing a defamatory libel "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel.

ERROR upon a record in which the following facts appeared: an indictment alleged that the defendant unlawfully, wickedly, and maliciously wrote and published a defamatory libel, he, the defendant, then well knowing the said defamatory libel to be false. Against the peace, &c. At the trial the defendant pleaded not guilty, and a justification that the libel was true, and published for the public benefit.

The jury found him guilty of writing and publishing the libel, but that at the time he did not know the same to be false. They negatived the plea of justification. The defendant moved the Court in arrest of judgment or for a new trial, but his motion was refused, and he was sentenced to two months imprisonment.

He then brought error.

The defendant in person. The conviction cannot be supported. Two distinct offences are created by 6 & 7 Vict. c. 96, ss. 4 & 5. By s. 4, if any person shall maliciously publish any defamatory libel, "knowing the same to be false," he shall, on conviction, be liable to imprisonment for any term not exceeding two years and to a fine. By s. 5, if any person shall maliciously publish any defamatory libel he shall, on conviction, be liable to fine or imprisonment or both, such imprisonment not to exceed one year. The only charge in the indictment was framed under s. 4, for publishing a defamatory libel "knowing it to be false." But the finding of the jury whereby knowledge of the falsity is in effect negatived, amounts to a verdict of not guilty.

Gill, for the Crown. The conviction for merely publishing a defamatory libel was right, although the indictment charged

that the defendant knew the libel to be false, and the jury negatived that averment. Libel is an offence at common law, as it was before 6 & 7 Vict. c. 96. At common law it was punishable by imprisonment for an unlimited period without hard labour, or by fine, or by both imprisonment and fine. 6 & 7 Vict. c. 96, created the new offence of publishing a defamatory libel knowing the same to be false: s. 4; and by s. 5 restricted the term of imprisonment for merely publishing a defamatory libel to two years and a fine. On an indictment for a misdemeanor the defendant may be convicted of another misdemeanor involved in it. "It is not necessary to prove the offence charged in the indictment to the whole extent laid, provided the facts proved constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment:" *Rex* v. *Hollingberry*. (1) See also 2 Hale, 191, 192; Archbold's Criminal Pleading (20th ed.), p. 240. On an indictment for murder the prisoner may be convicted of manslaughter. Both are felonies. So on an indictment for unlawfully and maliciously wounding, he may be convicted of a common assault: *Reg.* v. *Taylor*. (2) For both offences are misdemeanors, and the one necessarily involves the other. So, when a prisoner was charged with the misdemeanor of unlawfully and carnally knowing a girl above the age of ten and under the age of twelve years, he was convicted of a common assault: *Reg.* v. *Guthrie*. (3) In the present case the charge is for the misdemeanor of publishing a defamatory libel with the aggravation that the defendant knew it to be false. The jury rejected the matter of aggravation, and found the prisoner guilty of the lesser offence without it.

The defendant, in reply.

FIELD, J. I think our judgment must be for the Crown. The indictment contained an averment that the defendant published the libel "knowing the same to be false," and I am informed by the master of the Crown Office that before Lord Campbell's Act (6 & 7 Vict. c. 96), that was the usual form of an indictment for a libel at common law, but—acting on the principle that surplusage

(1) 4 B. & C. 329. (2) Law Rep. 1 C. C. 194.
(3) Law Rep. 1 C. C. 241.

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may be rejected—no objection seems to have been made until now to that form of averring the offence. It is clear that before Lord Campbell's Act (6 & 7 Vict. c. 96), knowledge of the untruth of the libel was immaterial in point of law, although it might be of weight in the consideration of the punishment, as it is a great aggravation of a libel to publish it knowing it to be false. A defendant could not set up the defence that he did not know the libel to be false. Lord Campbell's Act (6 & 7 Vict. c. 96) gave him a right to plead that the libel was true and published for the public benefit. But besides that provision other sections were inserted in the Act. Sect. 4 applies to the publication of a libel "knowing the same to be false," and s. 5 to publishing a defamatory libel, and in those sections the punishment is defined. For the former and more aggravated offence the imprisonment cannot exceed two years, and for merely publishing a libel the imprisonment cannot exceed twelve months. At the trial the counsel for the prosecution stated that he did not propose to proceed further on the charge that the defendant knew the libel to be false, and the case was accordingly left to the jury on the admitted publication of the libel, the question submitted to them being whether the libel was true. The jury found that the defendant published the libel but did not at the time know it to be false, and on that a verdict was entered for the Crown, and the defendant received judgment of imprisonment for two months—a term which is within the two sections. If it had exceeded twelve months a different question would have arisen, but it was within the common law and statutory punishment for publishing a defamatory libel.

The present writ of error was brought. It sets out what I have, in substance, stated. One of the assignments (1) of error is that by the record it appears that the verdict was not a conviction of the defendant for the offence charged in the indictment. What is the offence charged in the indictment? Primâ facie it is a common law misdemeanor of publishing a defamatory libel, and I am not aware, and there is no declaration in Lord Campbell's Act, that that does not continue an offence at common law. It is an offence at common law to publish a defamatory libel

(1) It is unnecessary to report the case on the other assignments.

whether false or not. The jury have certainly negatived the allegation that the defendant knew the libel to be false, and if that was an absolutely essential averment the defendant would be right. But I do not think it is. I think that it was competent to the jury to acquit the defendant of that portion of the charge which is statutory and convict him of the residue of the charge. The cases cited for the prosecution shew that satisfactorily. The first is *Rex* v. *Hollingberry*. (1) It may be said that the word "falsely" there used was not in any way equivalent to the words of Lord Campbell's Act "knowing the same to be false," but the principle was laid down by the Court that "in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. This was an indictment for conspiring falsely to indict a person for the purpose of extorting money. The jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor, whether the charge be true or false." (2) Apply that to this case, the jury found the defendant guilty of the misdemeanor of publishing a defamatory libel whether he knew it to be false or not. In *Reg.* v. *Hodgkiss* (3) the prisoner was indicted for perjury in a judicial proceeding. He had, in fact, sworn a false affidavit before a commissioner for the purpose of getting a bill of sale filed. The allegation that he "did wilfully and corruptly commit wilful and corrupt perjury" was rejected as surplusage, so as to state only the common law misdemeanor of taking a false oath, for which he was convicted, and the Court held that it was sufficiently stated, and Martin, B., distinguished *Rex* v. *Foster* (4) on the ground that in that case the indictment did not state facts sufficient to constitute the offence of taking a false oath.

There are two other cases to the same effect decided on the same principle. *Reg.* v. *Taylor* (5), where, on an indictment for unlawfully and maliciously wounding and unlawfully and maliciously inflicting grievous bodily harm, the prisoner was convicted of a common assault, and *Reg.* v. *Guthrie* (6), in

(1) 4 B. & C. 329.
(2) Page 330.
(3) Law Rep. 1 C. C. 212.
(4) 1 Russ. & Ry. 459.
(5) Law Rep. 1 C. C. 194.
(6) Law Rep. 1 C. C. 241.

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which Bovill, C.J. (1) said, of an indictment containing only one count for unlawfully assaulting and carnally knowing a young girl: "The indictment charges that the prisoner 'did unlawfully and carnally know and abuse' the girl against the form of the statute; and it also charges an offence at common law, viz., an assault," and the conviction for a common assault was affirmed. At one time I had a doubt arising from the fact that on an indictment for robbery the defendant cannot be convicted of a common assault. But the correct answer was given by the learned counsel for the prosecution—that the one offence is a felony and the other a misdemeanor. Here the offence for which the defendant was indicted and that of which he was found guilty are of the same nature.

WILLS, J. I am of the same opinion, and for the same reasons. This case cannot be distinguished in principle from the cases of a conviction for a common assault on an indictment for an assault of an aggravated kind under statutes rendering the offender liable to a greater punishment than that to which he is liable for a common assault.

Judgment for the Crown.

Solicitors for the prosecution: *Wontner & Sons.*
Solicitor for defendant: *Alfred Howard.*

(1) At p. 242.

J. R.

[IN THE COURT OF APPEAL.]

1888
June 12.

SWAIN *v.* AYRES AND OTHERS.

Landlord and Tenant—Lease—Agreement for Lease—Forfeiture—Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

An agreement for a lease is not a lease within the meaning of the 14th section of the Conveyancing and Law of Property Act, 1881, and therefore the terms of that section do not apply to a mere tenancy under an agreement for a lease, where there is no actual lease in existence, nor any title to specific performance.

The defendant in an action for recovery of land was in possession of the premises as tenant under an agreement for a lease, which provided that the lease to be executed thereunder should contain (inter alia) a covenant to keep the premises in repair and a condition for re-entry for breach of such covenant. Rent had been paid under the agreement, but no lease had been executed. The premises being out of repair the landlord brought the action to recover them as upon a forfeiture. No notice had been given before action under the above-mentioned section:—

Held, that, there being no lease in fact executed or title shewn to a decree for specific performance by execution of a lease, the section did not apply, and the action was maintainable.

Quære, whether the section would have applied, if there had been a right to specific performance.

APPEAL from the judgment of Charles, J. (reported 20 Q. B. D. 585).

The facts, which are fully stated in the report of the case in the court below, were briefly as follows:—

The action was brought by the plaintiff, the owner of a house, to recover possession thereof from the defendants as upon a forfeiture for breach of agreement to repair. It appeared that on July 25, 1853, one Larwell, a predecessor in title of the plaintiff, had entered into an agreement for a lease with one Mortimer, by which the latter agreed to lay out a certain sum in repairs and improvements, and upon his doing so a lease was to be granted him of the house for the term of eighty years, at a specified rent, payable quarterly. The agreement provided that the lease to be executed in pursuance thereof should contain all usual covenants, particularly covenants to pay rent and keep the premises in good repair, and a condition for re-entry for breach of any of such covenants. It appeared that Mortimer, the in-

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tended lessee, who was since dead, had entered and the stipulated sum had been laid out in repairs and improvements; and rent had been paid from time to time under the agreement but no lease had ever been executed. Mortimer's personal representatives had assigned their interest to a person named Luck, who was one of the defendants, the other defendants being his undertenants of the premises. At the trial evidence was given that the premises were not kept in repair in accordance with the terms of the agreement. It was admitted that no notice had been given before the action under the 14th section of the Conveyancing and Law of Property Act, 1881. The learned judge held that the section was not applicable, and gave judgment for the plaintiff. (1)

The defendant Luck appealed.

Cavanagh, and *Moyses*, for the defendant Luck. It is clear that, having entered and paid rent, at common law the defendant would be tenant from year to year on the terms of the agreement so far as applicable: *Doe* v. *Bell* (2); *Clayton* v. *Blakey*. (3) A demise from year to year is a lease according to the proper legal meaning of the term "lease." In the absence of any definition to the contrary the term "lease" in the Conveyancing Act, 1881, must be construed to include anything that in law is a lease. A tenant from year to year is frequently spoken of by legal authorities as a lessee and his interest as a lease: see the definition of a lease in 2 Sheppard's Touchstone, 7th ed., pp. 266 et seq.

Secondly, an agreement for a lease is within the section. It was held in *Walsh* v. *Lonsdale* (4) that, where a Court of Equity would decree specific performance, the tenant holds under the agreement on the same terms in equity as if a lease had been granted. Specific performance would be decreed in this case

(1) 44 & 45 Vict. c. 41, s. 14, provides "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serve on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and &c."

(2) 5 T. R. 471.

(3) 8 T. R. 3.

(4) 21 Ch. D. 9.

notwithstanding the breach of the agreement to repair. (1) The principles on which equity granted or refused specific performance have been altered by this Act. The ground on which Courts of Equity refused specific performance in cases where there had been a breach of covenant was that the Court would not enforce specific performance where the lease if executed might be immediately forfeited; but this ground has ceased to be applicable since the enactment of s. 14 of the Conveyancing Act, 1881. If the section be applicable, its provisions would prevent the lease from being so forfeited. It is contended that, apart from the question whether the defendant could obtain specific performance, he holds under a lease in equity. Equity looks on that as done which ought to have been done. There is an agreement for a lease under which the tenant has entered and paid rent, and a deed is not necessary in equity. The statute 8 & 9 Vict. c. 106, s. 3, only provides that a lease for more than three years shall be void *at law* unless there is a deed; therefore a deed is not essential to the existence of the lease in equity. The intention of the 14th section of the Conveyancing Act, 1881, was that every tenant should have the benefit of its provisions.

[They also cited *Gourlay* v. *Duke of Somerset* (2); *Coatsworth* v. *Johnson*. (3)]

Finlay, Q.C., and *Lush Wilson*, for the plaintiff, were not called upon.

LORD ESHER, M.R. In this case the defendant was in my opinion tenant to the plaintiff, and it seems to me clear that the terms of the agreement for a lease which existed were so far applicable to such tenancy that the landlord, apart from the question whether the provisions of the 14th section of the

(1) The learned counsel endeavoured to shew from correspondence and otherwise that the breach of covenant had been waived and that special circumstances existed, under which a Court of Equity would decree specific performance, notwithstanding the breach of covenant to repair, and cited authorities on the point; but, as will be seen from the judgments, the Court was of opinion that, no such circumstances having been pleaded or relied upon at the trial, the point was not open to the defendant, and therefore the facts and arguments as to this point are not set out.

(2) 1 V. & B. 68.

(3) 55 L. J. (Q.B.D.) 220.

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Conveyancing Act, 1881, apply, had a right of re-entry for breach of the terms of the tenancy, and could, if the tenant refused to go out, bring an action for the recovery of the premises. The question then arises whether the tenant is entitled to the protection given by the 14th section of that Act. That section provides that "a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice, &c." The question whether the defendant is within that section must depend on whether this is a case of "a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease" within the meaning of the section. I think that the section must be taken to apply primâ facie to the case of an actual tangible lease in existence and not to the case of a mere tenancy without a lease in existence. That there was a "lease" in the ordinary meaning of the term cannot, I think, be alleged in this case. There is no actual lease in existence; there is only a tenancy.

Then it is said that there is an agreement for a lease, and that the word "lease" in the statute comprises such an agreement. That is to say, that the moment there is an agreement for a lease, before entry and before any rent is paid or actual lease executed, there is a lease. That is not according to the ordinary meaning of the word in the English language. Charles, J., in the court below, said that the word "lease" did not, in the ordinary sense, comprise a mere agreement for a lease, and, by way of strengthening the argument, he referred to the fact that by s. 18 of the Act the provisions of that section are expressly extended to agreements for a lease. I do not think the argument derived from that fact was needed, but it was a perfectly good argument by way of fortifying the construction he was putting on s. 14. Primâ facie, therefore, the terms of s. 14 would not apply to a mere agreement for a lease. Does it then apply to anything besides an actual lease in tangible existence? I am inclined to think it would be correct to say that the section would apply to the case of something which in law is equivalent to an actual lease. What, then, would be such

an equivalent? The distinction between law and equity is now abolished in the sense that the same Court is to give effect to both, and that, when the doctrines of law and equity conflict, the latter are to prevail. I should therefore be disposed to say that, when there is such a state of things that a Court of Equity would compel specific performance of an agreement for a lease by the execution of a lease, both in the Equity and Common Law Divisions the case ought to be treated as if such a lease had been granted and was actually in existence. There would then be the equivalent of a lease, that is to say, the lease of which equity would compel the execution in specific performance of the agreement. That is a very different thing from saying that, where equity would not compel specific performance by the execution of a lease, the lease of which equity would not decree execution is to be considered in equity as existing. That contention seems to me quite untenable. It seems to me quite impossible to say that equity would consider a lease in existence, though it would not grant specific performance by decreeing execution of a lease. Such a contention seems to me to make the doctrine of equity on the subject self-contradictory.

The defendant in this case had a tenancy by reason of having entered into possession under the agreement and paid rent. The effect at common law would have been, as was stated in *Bennett* v. *Ireland* (1), viz., that he would hold on such of the terms of the agreement as might be applicable to a tenancy from year to year. At the present time, assuming that there had been a right to specific performance, the effect of such a holding, according to what the late Master of the Rolls said in *Walsh* v. *Lonsdale* (2), would be that the tenant must be treated in law as holding on the same terms as would be introduced into a lease executed in pursuance of the terms of the agreement for a lease. But, if equity would not compel specific performance, he does not hold on a lease or on the terms of any lease of which equity would compel execution, but he has merely a tenancy, which in my opinion does not come within the meaning of the term "lease" as used in s. 14. Then could the defendant in this case get specific performance of the agreement for a lease? It is argued that this

(1) E. B. & E. 334.

(2) 21 Ch. D. 9, at p. 14.

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Act has altered the principles on which a Court of Equity used to grant or refuse specific performance. This is the first time I have heard of an Act altering not the practice of a Court but the general principles on which it has invariably acted. I do not think that the Act has done any such thing. The section cannot be applied till there is a lease in some sense, if not an actual lease then that which is its equivalent, viz., a right to one according to the equitable doctrine of specific performance. That must be established according to the doctrine of equity before the section can apply. So it cannot be that the section has altered the principles of equity with regard to specific performance.

Then it was argued that a Court of Equity would grant specific performance notwithstanding the breaches of covenant. It may be that under certain circumstances a Court of Equity would do so, but I do not think that it has ever been held that specific performance would be granted in cases where there was a breach of a contract to repair without any other circumstances, such as surprise or some other excuse. If there were any such other circumstances in this case they ought to have been brought forward at the trial. In this case none such were pleaded, and none such were brought forward at the trial. The existence of such circumstances is now suggested for the first time. That being so, I do not think we can go into the question whether there are such circumstances in this case; and we must treat the case, I think, as one in which a Court of Equity would not grant specific performance. Therefore the case is one in which no actual lease within the meaning of the section was in existence, nor was there the equivalent of a lease, viz., a right to specific performance by the execution of a lease.

It therefore appears to me that the case is not within the 14th section of the Conveyancing Act, 1881. Our present decision may go a step farther than we went in *Coatsworth* v. *Johnson* (1); but it seems to me that any one might without much difficulty see from what was there decided that we should be prepared to go so far. For these reasons I think the appeal must be dismissed.

(1) 55 L. J. (Q.B.D.) 220.

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LINDLEY, L.J. The only question raised on the pleadings or at the trial, as it appears to me, was whether the defendant was entitled to the protection given by s. 14 of the Conveyancing Act, 1881. I think that the learned judge below was right in holding that the case was not within that section. The section in terms applies to rights of re-entry and forfeiture "under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease." I think, looking at those words alone, and à fortiori if they are taken in connection with the words of sub-s. 3 of the section, that it would be wrong to construe the section as including an agreement for a lease. A lease and an agreement for a lease are two different things, notwithstanding any expressions by which they may have been for certain purposes spoken of as equivalent: and I do not think that any Court without doing violence to language could say that an agreement for a lease was a lease. It was contended that the defendant having entered into possession and paid rent was a lessee. Assuming that to be so in one sense, it does not follow that there was a proviso or stipulation in a lease within the meaning of the section. It was argued with some ingenuity that, though in such cases there is not a lease in law, there is a lease in equity. That seems to be playing with words. There is not in fact a lease. It may be that there is an agreement of the terms of which equity would decree specific performance by the execution of a lease. It was argued that this was a case in which equity would grant specific performance, and, that being so, the case must be treated as if such a lease were already executed. That case ought to be set up specifically by the pleadings or at the trial. It would raise a very important question, and one that must be decided with care. In my opinion we have not before us sufficient materials to enable us to judge whether the facts of the case were such that a Court of Equity would decree specific performance. It may be that there were in this case, as alleged, circumstances of surprise or other matters which would prevent the breach of covenant from being fatal to the right to specific performance, but I think it is too late at this stage of the litigation for the first time to bring forward those facts and to go into the question whether under all the circumstances the case was one in

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which a Court of Equity would decree specific performance. It seems to me, therefore, that we can only look at this case as an ordinary one of an agreement for a lease where there has been a breach of a contract to repair. It was argued that by the enactment of s. 14 the reason why a Court of Equity in such a case refused specific performance has been swept away. The proposition appears startling, and I am not prepared to assent to it. I should have thought that, before the argument can be adduced that the section applies because there is a right to specific performance, it would be necessary to shew a right to specific performance independently of the section. The argument seems to come to this; that in order to obtain the benefit of s. 14 you may assume that a Court of Equity would grant specific performance by reason of the provisions of the section. The Act has been in force since 1881, and the point has never before been taken. As at present advised I am not prepared to assent to the argument, but if the point were really raised, it might be necessary to consider it further. As I have already said, I do not think that under the circumstances of this case in fairness to the plaintiff it can be considered to be open to the defendant. The only point which seems to me really open is the short point whether the agreement for a lease under which the defendant was in possession is for this purpose equivalent to a lease. I do not think that it is. If the circumstances were such that it must be taken that a Court of Equity would decree specific performance, a different question might arise. But I do not think that that question really arises. For these reasons I think the appeal must be dismissed.

LOPES, L.J. It seems to me that the legal position of the defendant in this case was that he was tenant from year to year on the terms of the agreement for a lease. That being so, I am of opinion that this was not the case of a "right of re-entry or forfeiture under a proviso or stipulation in a lease for breach of a covenant or condition in the lease" within the 14th section of the Conveyancing Act, 1881. I do not think that a mere tenant from year to year without any actual lease has a lease within the meaning of the section. It is said that the defendant had an

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agreement for a lease which was equivalent in law to a lease, because a Court of Equity would grant specific performance of it. If it were clear that a Court of Equity would decree specific performance of the agreement for a lease, I should not be disposed to agree with this contention; but I am of opinion, having regard to the questions raised on the pleadings and the evidence adduced at the trial, that in this case it cannot be taken that a Court of Equity would grant a decree for specific performance on the ground that the defendant had committed a breach of contract. It was argued that the effect of s. 14 was to alter the practice in equity with regard to granting specific performance and to sweep away a series of decisions, but I cannot adopt that argument. Under the circumstances of this case I do not think the defendant has brought himself within the 14th section of the Conveyancing Act, 1881, and therefore the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *W. Bristow.*
Solicitors for defendant: *J. C. Scard.*

E. L.

GUARDIANS OF THE POOR OF SOUTHAMPTON *v.* BELL AND TAYLER.

June 20.

Poor-rate — Practice — Costs—Solicitor and Client—Solicitor to Guardians—Taxation of Costs by Clerk of the Peace—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *ss.* 32, 35, 39—*Attorneys and Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.

A solicitor employed by gardians of the poor is entitled, notwithstanding that his bill of costs has been taxed by the clerk of the peace under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 39, to an order for taxation as between solicitor and client under the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.

POINT of law raised by the pleadings.

The action was brought by the plaintiffs, the guardians of the poor of Southampton, against the defendants, a firm of solicitors, to recover 64*l.* 16*s.* 6*d.*, a balance claimed by them out of 600*l.* with which they had provided the defendants for the purpose of carrying on an action. This sum was arrived at by deducting from the fund 535*l.* 3*s.* 6*d.*, the costs allowed to the defendants

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by the allocatur of the clerk of the peace of Hampshire under s. 39 of the Poor Law Amendment Act (7 & 8 Vict. c. 101), less his taxing fee. (1) The defendants admitted their liability as to 13*l.* 3*s.* 3*d.*, but claimed to retain the residue in respect of their costs and disbursements, and also that they were not bound by the taxation under the Poor Law Amendment Act, but had a right as between solicitor and client to have their costs taxed by

(1) By the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 32: "Every auditor appointed for such a district shall have full powers to examine, audit, allow or disallow of accounts and of items therein, relating to money assessed for and applicable to the relief of the poor of all parishes and unions within his district, and to all other money applicable to such relief."

By s. 35: "If any person aggrieved by any allowance, disallowance, or surcharge by any such auditor require such auditor to state the reasons for the said allowance, disallowance, or surcharge, the auditor shall state such reasons in writing in the book of account in which the allowance, disallowance, or surcharge may be made; and it shall be lawful for every person aggrieved by such allowance, and for every person aggrieved by such disallowance or surcharge, if such last-mentioned person have first paid or delivered over to any person authorized to receive the same all such money, goods, and chattels as are admitted by his account to be due from him or remaining in his hands, to apply to the Court of Queen's Bench for a writ of certiorari to remove into the said Court the said allowance, disallowance, or surcharge."

By s. 39: "On application of any overseer, or of any board of guardians, or of any attorney at law, it shall be the duty of the clerk of the peace of the county or place, or his deputy, if thereunto required, to tax any bill due to any solicitor or attorney in respect of business performed on behalf of any parish or union situate wholly or in part within such county or place; and the allowance of any sum on taxation shall be primâ facie evidence of the reasonableness of the amount, but not of the legality of the charge; and the clerk of the peace shall be allowed for such taxation after the rate to be fixed from time to time by the master of the Crown Office and declared by an order of the said Commissioners; and if any such bill be not taxed before it is presented to the auditor, the auditor's decision on the reasonableness as well as the legality of the charges shall be final."

By the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37, if no application has been made for the taxation of a solicitor's bill of costs within a month after it has been delivered, "it shall be lawful for such reference to be made either upon the application of the attorney or solicitor or the executor, &c. of the attorney or solicitor . . . . or upon the application of the party chargeable by such bill," and the costs of the reference are to follow the event, except that "if such bill when taxed be less by a sixth part than the bill delivered, then such attorney, &c. shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered then the party chargeable with such bill, &c. shall pay such costs."

a master under s. 37 of the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73). A summons by the defendants for taxation was also before the Court.

P. Gye, for the plaintiffs. The guardians are entitled to judgment on the point of law. Taxation of costs by the clerk of the peace under s. 39 of the Poor Law Amendment Act, 1844, is final as between the guardians and their solicitor. The difficulty of construing ss. 32, 35, and 39, which taken together regulate the poor law audit, was pointed out by the Court in *Reg.* v. *Hunt.* (1) But it would seem that the effect is to supersede s. 37 of the Attorneys and Solicitors Act, 1843.

J. Alderson Foote, for the defendants. The defendants are not concluded by the taxation: 7 & 8 Vict. c. 101. No claim is maintainable on the allocatur. By the terms of s. 39 allowance by the clerk of the peace is only "primâ facie evidence of the reasonableness" of a charge and is not evidence of its "legality," and the taxation is itself not a necessary part of the audit. The pleadings do not shew that an audit was held, but if one were proved to have taken place, the Act does not give the solicitor any right of audience. This omission shews that the sections relate only to the power to charge law costs on the rates, and do not affect the legal rights of the solicitor to the guardians as between himself and his clients. If the guardians expressly directed the solicitor to make a payment which the auditor afterwards disallowed, it would be unjust that the disallowance should bind the solicitor. The defendants are entitled to an order for taxation under s. 37 of the Attorneys and Solicitors Act, 1843.

[He cited *In re Worth.* (2)]

P. Gye, in reply. The legislature intended that the rights and remedies of a solicitor employed by guardians should depend solely upon the Poor Law Amendment Act, 1844. The defendants might have applied for a certiorari to review the taxation of the clerk of the peace under s. 35. As they have not done this they are bound by the allocatur.

MANISTY, J. The question raised is, whether the 39th section of the Poor Law Amendment Act, 1844, which provides for a

(1) 6 E. & B. 408. (2) 18 Ch. D. 521.

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taxation in certain cases by the clerk of the peace of the costs of the solicitor employed by a board of guardians, as a matter connected with the auditing of accounts under the poor law, has the effect of disentitling the solicitor to taxation as between solicitor and client under the 37th section of the Attorneys and Solicitors Act, 1843. I am of opinion that the provisions of the section have not this effect. If the auditor adopted the allocatur and disallowed the sum claimed, the result would be, in my opinion, notwithstanding some expressions in *Reg.* v. *Hunt* (1), that the propriety of the disallowance could not be disputed as between the guardians and the ratepayers, but that as between the guardians and the solicitors to the board the question would remain open, and the action could be maintained. The other construction involves the strange result that the solicitor to the board, and I presume also all other persons with whom the board deals, must wait for payment till after the audit has taken place. It is to be remembered, too, that the auditor cannot be supposed to have any knowledge of the principles on which the taxation of a solicitor's bill proceeds. The defendants are entitled to an order for the taxation of their costs by a master under s. 37 of the Attorney and Solicitors Act, 1843.

STEPHEN, J. I agree with my learned Brother. The object of the section is to prevent the waste of the rates in useless expenditure. The liability of the guardians to their solicitors is quite a different matter, and the defendants are entitled to have their costs taxed by a taxing master, notwithstanding the taxation by the clerk of the peace.

Order for taxation under the Attorneys and Solicitors Act, 1843, *the costs of the application to be the defendants' in any event, and the costs of the summons to tax to be costs in the taxation.*

Solicitors: *Braikenridge, for Harfield, Southampton; Emanuel, Round, & Nathan, for Bell & Tayler, Southampton,* Defendants in person.

(1) 6 E. & B. 408.

H. D. W.

IN RE COMPANIES ACTS. EX PARTE WATSON.

1888
June 27.

Building Society—Borrowing without Powers—Subsequent Powers—Deposit Note for past Loan, Validity of—Estoppel—Building Societies Act, 1847 (37 & 38 *Vict. c.* 42).

The directors of an unincorporated building society which had no borrowing powers borrowed money for the benefit of the society and gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave up to them the promissory notes above mentioned:—

Held, that the deposit note was not binding on the society.

APPEAL from the Sheffield County Court.

The facts and arguments are sufficiently stated in the judgment of the High Court.

Buckley, Q.C. (with him *Younger*), for the appellant.

Upjohn, for the respondent.

The following cases were cited:—*Hill* v. *Manchester and Salford Waterworks Co.* (1); *Horton* v. *Westminster Improvement Commissioners* (2); *Chapleo* v. *Brunswick Building Society* (3); *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (4); *Cook* v. *Wright* (5); *Southall* v. *Rigg* (6); *Fountaine* v. *Carmarthen Railway Co.* (7); *Ex parte Chippendale, Re German Mining Co.* (8)

CAVE, J., read the following judgment.

This is an appeal from the decision of the County Court Judge of Sheffield holding that the claim of the appellant ought not to be allowed to rank as a debt against the assets of the Sheffield

(1) 2 B. & Ad. 544.
(2) 7 Ex. 780.
(3) 6 Q. B. D. 696.
(4) 29 Ch. D. 902.
(5) 1 B. & S. 559.
(6) 20 L. J. (C. P.) 145.
(7) Law Rep. 5 Eq. 316.
(8) 4 De G. M. & G. 19.

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Cave, J.

Permanent Benefit Building Society now being wound up under a supervision order made on December 9, 1886.

The society was established in 1863, and as at first constituted had no power to borrow. In 1868 John Watson lent the society 200*l.* on a promissory note payable three months after demand. Shortly afterwards he lent the society a further sum of 1000*l.* on a similar note payable six months after demand. On June 21, 1876, the rules were altered, and the society acquired borrowing powers to a limited extent. In 1884 John Watson died intestate, and letters of administration were granted to the present appellant. On December 29, 1884, the administrator required the society to repay the money advanced by the intestate. Several interviews took place between the solicitor of the administrator and the secretary of the society with reference to the repayment of the 1200*l.*, and ultimately on August 22, 1885, the administrator agreed to refrain from instituting proceedings against the society for the repayment of the loan on the directors giving him a deposit note for the amount. On October 2, 1885, the directors gave the appellant a deposit note for 1200*l.* dated July 1, 1885. On October 29, 1886 the appellant, in accordance with the terms of the deposit note, gave the society three months' notice to pay off the amount. The application to the county court was made by the liquidators of the society, who asked for directions whether this claim should or should not be allowed by them as a debt owing by the society. The judge held that the claim could not be allowed.

Mr. Buckley, for the appellant, contended that as the deposit note was under the seal of the society, the society was estopped from disputing its validity, and for this position he cited *Hill* v. *Proprietors of the Manchester and Salford Waterworks* (1) and *Horton* v. *Westminster Improvement Commissioners.* (2) But it is well established that a corporate body cannot be estopped by deed or otherwise from shewing that it had no power to do that which it purports to have done: *Fairtitle* v. *Gilbert* (3); and there is nothing in the cases cited inconsistent with this doctrine. Secondly, it was urged that the borrower even if he had no

(1) 2 B. & Ad. 544.

(2) 7 Ex. 780.

(3) 2 Term Rep. 169.

valid debt was entitled to stand in the place of those whose claims against the society had been satisfied out of his money, and that he therefore had a valid claim against the society for something at all events, which the directors had authority to compromise by giving him the deposit note in question; the answer to this contention is that it does not represent what actually took place. The directors never intended to compromise a doubtful claim. They recognised the promissory notes given to John Watson as constituting valid claims against the society, which in fact they were not, and then gave the deposit note in question in exchange for the promissory notes, or, in other words, they issued the deposit note to discharge a non-existent debt. Hence it is clear that the result of the transaction was that a deposit note was given in consideration of the discharge of an invalid debt. The society, if the deposit note were held good, would be 1200*l.* worse by the transaction. How can that be regarded as a borrowing transaction? It seems clear that a deposit note given under such circumstances can have no greater validity than the alleged debt for which it is substituted: see the observations of Lord Selborne in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1) A passage was cited to us from the judgment of Wood, V.C., in *Fountaine* v. *Carmarthen Railway Co.* (2) in which that learned judge is reported to have said that Mr. Week's debenture was void ab initio, and the directors did not, as they ought to have done, put him in a proper position by issuing to him a new debenture, &c. I am unable to understand the meaning of the words "as they ought to have done," or to reconcile them with the decision of the Court of Appeal in *Blackburn Benefit Society* v. *Cunliffe Brooks* (3), which as a decision of the Court of Appeal is binding on us, and in my judgment governs this case.

Lastly, it was said that the claim of the appellant might be supported on the grounds taken in *Ex parte Chippendale, Re German Mining Co.* (4). It is unnecessary to go into the facts of that case, they are entirely different from the facts of the case before us; and the doctrine laid down there is quite inapplicable here. In my opinion the judgment of the Court below must be

(1) 22 Ch. D. 61.
(2) Law Rep. 5 Eq. 316, 324.
(3) 29 Ch. D. 902.
(4) 4 De G. M. & G. 19.

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upheld, and the appeal dismissed. Appellant to pay his own costs, respondent to take his costs out of the estate.

WILLS, J., read the following judgment.

In the year 1868 the society, being an unincorporated building society, and having therefore no power to borrow, nevertheless had borrowed 1200*l.* from John Watson which was secured upon notes of the directors to be paid out of the funds of the society.

The result was that the lender had no recourse against the society to recover the money lent, but had a right to trace it and claim the securities in which it could be shewn to be invested, or to be repaid such portions as could be shewn to have been expended in satisfying the lawful liabilities of the society.

In the year 1876 the society was incorporated under 37 & 38 Vict. c. 42, and acquired a power to borrow, and in 1885 the transaction took place which is now impeached.

The administrator of the lender gave up the notes of the directors, which were his security, and took in place of them the loan note of the society, an instrument good in form, and constituting, if valid, an obligation on the part of the society to pay 1200*l.* to the present appellant personally. I take this to be equivalent to the payment by the society of 1200*l.* to the appellant as personal representative of the original lender and the advance of 1200*l.* by the appellant to the society. The question is, whether under such circumstances an action will lie for the 1200*l.* so advanced. No question arises at present as to whether the statutory limit of amount was exceeded when the foregoing arrangement was made.

It was strenuously argued that the loan note of the society under its seal (affixed with all due formalities), which stated that the money was lent by the appellant on the day the instrument bears date, creates an estoppel which prevents the society from now saying that the money was lent not then but at an earlier date, and that if so, as the advance was made when they had power to borrow, the appellants' case is made out.

It will be seen that in the view I take this proposition does not help the appellant. The only estoppel suggested is one that would oblige us to treat the money as lent at the date of the

instrument, and as I start with the proposition that the transaction is the equivalent of two, one of which consisted in an advance of 1200*l.* by the appellant, the estoppel carries his case no further. The objection to the appellant's case lies much deeper. It is that you must take the whole transaction together and see whether it can stand; you cannot take one half of it only, and say that because if that stood by itself (and was therefore something very different from what it really was) it would be good, it can still stand when considered as part of a larger whole. If the whole transaction to which the appellant and the directors were parties was illegal, it is quite immaterial by what machinery it was carried out, and if both the contracting parties with full and equal knowledge of the material facts concurred in a transaction the effect and object of which was to make an illegal appropriation of the funds of the society, such a dealing cannot be taken to pieces, and one half of it be treated apart from the other.

Nor does it make any difference that the parties acted, as they did in this case, with perfect good faith. They are bound by the law, though they did not understand it. The question is not whether in what they did they intended to do wrong, but whether they have between them attempted to accomplish an illegal thing.

If this be once thoroughly understood, it seems to me that a very few words are sufficient to dispose of the case. This is not a case in which it is even necessary to resort to the rule laid down in *Chapleo* v. *Brunswick Building Society* (1), that persons dealing with a corporation having a limited power of borrowing are put upon inquiry whether that limit is being exceeded. In this instance every cardinal fact was equally within the knowledge of, and equally known to, both of the parties, and the very object of the transaction was that which is its essential vice, according to my view, viz. that the money was borrowed for the purpose of repaying a loan illegally contracted and to the payment of which, as a loan, the funds of the society could not be legally applied. If this be the true result of the facts, it is clear that the contract belongs to a class to which effect cannot be given by a Court of Justice, however innocent the parties may

(1) 6 Q. B. D. 696.

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have been of any fraudulent or immoral motive. They intended to do a thing which was against the law. It matters not that they did not appreciate the fact. The Courts will not permit a bargain to stand which was a part of such whole.

The only authority cited which gives any countenance to such a claim is *Fountaine* v. *Carmarthen Ry. Co.* (1) In that case a Mr. Weeks had lent a sum of money on debenture to the defendant company. At the time that he did so, their borrowing powers were already exceeded. Page Wood, V.C., held that his debenture was void ab initio, and added: "The directors did not, as they ought to have done, put him in a proper position by issuing to him a new debenture." (p. 324). I see no substantial distinction between issuing a new debenture to replace a void one—which would have amounted to a payment of the void debenture by the money freshly borrowed—and the present case, and if the obitur dictum of the learned Vice-Chancellor be right, the directors in the present case did only what they ought to have done, and the loan note of 1885 was good. But questions of this kind have been very much discussed since then, and I do not think it possible to reconcile the view so presented with later decisions of the Court of Appeal, nor, I must add, with sound legal principles. If the directors ought to have issued a fresh debenture, when the company became legally capable of borrowing, in exchange for one which did not bind the company, they certainly would have been at liberty to pay the original debt out of the funds of the company, and yet this is exactly what the Court of Appeal in the *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (2) held could not be done.

There the society had illegally borrowed money from their bankers. The bankers had made entries in the pass-book which were clearly assented to by the directors, and which as between individuals sui juris would undoubtedly have established the payment by the customer of the sums borrowed. "The liquidators," said Cotton, L.J., in the considered judgment of the Court, "are suing on behalf of the society, and complain that the directors, both in borrowing and in directing the application

(1) Law Rep. 5 Eq. 316. (2) 29 Ch. D. 902.

of the moneys of the society, acted in excess of the authority given to them, and that their acts do not bind the society, and that the bankers knew that the directors had no authority so to deal with the moneys of the society. This, in our opinion, is correct—and consequently the acts of the directors were unauthorized, and are not to be considered as acts of the society." It is impossible, I think, to reconcile the dictum of Page Wood, V.C., with this very explicit statement of the grounds upon which the Court of Appeal based its decision in the *Blackburn Case* (1), and we are of course bound by the judgment of the Court of Appeal. Mr. Buckley suggested that in the *Blackburn Case* (1) the ratio decidendi was that the bankers had paid themselves, and that it really amounted to nothing more than a decision that *Clayton's Case* (2) did not apply. To hold *Clayton's Case* (2) did not apply would be, however, to hold pretty much to the same effect as the judgment of the Court of Appeal. But it is clear that the decision went upon no narrow or technical ground, but upon the broad and intelligible principle that where the payment was beyond the proper scope of the authority of the directors, and where the person receiving the payment had full means of knowing, had he appreciated the facts, that it was so, the money so paid could not be held by the recipient, but must be repaid.

That case appears to me decisive of the present. If it would have been unlawful for the directors to pay the money originally lent to them, how could it be lawful for them and the appellant to make an agreement that they should repay him money he was lending to them for the express purpose of making an unlawful application of it? and what does it matter with what forms and solemnities such a transaction was carried out?

It was sought to support the transaction as a compromise by which the appellant as administrator gave up his right to follow the original 1200*l.* if he could and claim the benefit of any securities upon which it was invested, or the repayment of such portions of it as he could shew to have been applied in payment of the legal liabilities of the society. I am not prepared to say that such a compromise might not be supported. The answer to

(1) 29 Ch. D. 902. (2) 1 Mer. 572.

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the argument is that the state of things supposed exists in imagination only, and that the facts disprove it. The transaction of 1885, moreover, must be taken as a whole, so far as the society is concerned—and whatever rights the appellant as administrator had against the funds of the society remain, except in so far as they may be affected by lapse of time.

The result is to be regretted. We are told that claims against the society to the extent of 60,000*l.* or 70,000*l.* depend upon our decision; that is to say, that persons have advanced money to the society, which the directors, professing to act and perhaps intending to act simply for the benefit of the society, have had and dissipated to this enormous amount. It is the third case which has come before myself within the last few weeks in which similar enormous losses have been shewn to have fallen upon the persons interested in one way or another in building societies, and in which they must fall chiefly upon persons in the humble walks of life. It is a very lamentable state of things, but I see no help for it. The money in such cases is gone—gone by mismanagement always, often by fraud and jobbery, and by the time that such questions come before the Courts it is a mere question upon whom the loss shall fall. It is rarely borne by the persons whose ignorance, mismanagement, or dishonesty has caused the loss, as they are almost always without means, and have generally speculated as badly for themselves as for those who have put them in office. I see no help for it but in that which appears to be a plant of slow growth, caution on the part of the persons liable to be affected by the ruin of these societies. So long as it is supposed that the possession of small means, limited experience, and imperfect education, together with the necessity of devoting the greatest part of a man's time and energies to the earning of his daily bread, are qualifications for the prosecution on a gigantic scale of an exceedingly difficult business, requiring the utmost care, knowledge, and judgment to make it a success, so long, I fear, will the tale of ruin continue to be told, and the Courts be occupied with deciding upon what classes of innocent and unfortunate investors the heavy loss shall fall.

The decision of the county court judge must be upheld, and the appeal dismissed. But I think it only right to the appellant

to say that, except by a rendering of the words "fraud" and "fraudulent" which does not commend itself to my judgment, I cannot concur in many of his remarks. "Fraud," in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much unnecessary pain inflicted, by its use where "illegality" and "illegal" are the really appropriate expressions.

Appeal dismissed.

Solicitors for appellant: *Wynne, Holme, & Wynne.*

Solicitors for respondent: *Prior, Church & Adams, for Herbert Bramley, Sheffield.*

J. R.

BOWDEN AND OTHERS *v.* BESLEY AND ANOTHER.

June 7.

Municipal Corporation—Election of Councillors—Nomination Paper—Signature of assenting Burgess—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50).

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Third Schedule, Elections, Part II., Rules as to Nomination in Election of Councillors: 1. Every candidate for the office of councillor must be nominated in writing. 2. The writing must be subscribed in the case of a ward election by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination.

A nomination paper at a ward election was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the burgess roll were entered the names "Edwin John Hooper," "William E. Waller," and "Robert Turner," the numbers opposite these names on the burgess roll being the same as those appearing opposite the signature of the assenting burgesses on the nomination paper:—

Held, that the nomination paper had been duly subscribed by the assenting burgesses.

SPECIAL CASE stated under sect. 93, sub-s. 7, of the Municipal Corporations Act, 1882. The case set out the circumstances under which the validity of the election of the respondents as councillors for the St. David's ward of the city of Exeter was disputed. The facts were shortly as follows:—

At an election of two councillors in November, 1887, the respondents were duly nominated as candidates.

One Henry Tuckwell, a person duly qualified for election, was

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also nominated by two nomination papers, to each of which the same objection was taken.

One of the nomination papers of Henry Tuckwell was subscribed by eight assenting citizens, and amongst them by three whose signatures and whose description on the burgess roll appeared thus on the nomination paper:—

Signature.	Number on Roll of Citizens with the Ward or Polling District, if any, having a distinct numbering.
Edwin J. Hooper	No. 867, St. David's Ward.
W. E. Waller	No. 908, St. David's Ward.
R. Turner	No. 1045, St. David's Ward.

In the ward roll which was in force at the time of the election the following names appeared as entered against the following numbers:—

867 . . Edwin John Hooper.
908 . . William E. Waller.
1045 . . Robert Turner.

A formal objection was made on behalf of the respondent Lawrence that the nomination papers were not duly subscribed by duly enrolled burgesses by reason of the fact that a comparison of the nomination papers with the burgess roll did not disclose the identity of the assentors. (1)

The mayor allowed the objection, and there being no other candidate, the respondents were declared duly elected.

The petitioners in due course petitioned against the return of the respondents.

The question for the Court was, whether the mayor was right in holding the nomination paper invalid.

(1) The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Third Schedule, Elections, Part II., Rules as to Nomination in Elections of Councillors:

1. Every candidate for the office of councillor must be nominated in writing.

2. The writing must be subscribed by two burgesses of the borough, or in the case of a ward election, of the ward, as proposer and seconder, and by eight other burgesses of the borough or ward, as assenting to the nomination.

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Asquith, for the petitioners. The nomination paper was duly subscribed by the assenting burgesses. The form of nomination paper in Schedule 8, Form I., of the Act of 1882 requires the surname and other names of the candidate himself to be set out, but it only requires the "signature" of the nominators and assentors. The decision in *Moorhouse* v. *Linney* (1) is not applicable to the present case. There was in that case a patent discrepancy, there being an additional name in the nomination paper which was not in the burgess roll. Here the initials of the names in the roll appear in the nomination paper. [He was stopped by the Court.]

J. A. Foote, for the respondents. The object of the Act is that the identity of the nominators and assentors should be disclosed upon a comparison of the nomination paper with the burgess roll. A mere signature in the colloquial sense of the term is therefore insufficient. The only meaning that can be given to the word "signature" is that the nominators and assentors must write their own names themselves. A person who professes to act as a burgess must act under the same name as that in which he is enrolled.

[MANISTY, J. Is not this a mere misnomer or inaccurate description, such as is provided for by s. 241 of the Act?]

No; the defect is not cured by that section, which does not apply to nomination papers. An initial is not a name, and is insufficient to identify the person, though a contraction, as "Wm." for William, would do.

[He also cited *Gothard* v. *Clarke* (2); *Mather* v. *Brown*. (3)]

MANISTY, J. I am of opinion that the mayor was wrong in holding this nomination paper to be invalid. I think that s. 241 of the Act is applicable to this case, but it may be decided upon another ground. The rules as to nomination of councillors given in the third schedule of the Act prescribe that every candidate must be nominated in writing, and that the writing must be subscribed by two burgesses as proposer and seconder, and by eight other burgesses as assenting to the nomination. Nothing

(1) 15 Q. B. D. 273. (2) 5 C. P. D. 253.
(3) 1 C. P. D. 596.

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is said as to how their signatures are to be made; they are to subscribe the nomination paper. This is followed by an express enactment that the nomination paper must state the surname and other names of the candidate; but there is no such provision as to the names of the burgesses. Then we come to the form of nomination paper given in the eighth schedule. That form complies with the requirements of the third schedule, for it contains one column for the surname and a separate column for the other names of the candidate himself; but as regards the nominators and assentors, there is one column only, which is headed "Signature," and in which the initials "A. B.," &c., are inserted. Those initials, in my judgment, merely represent the ordinary signature of the nominating or assenting burgess, and I think that it was the intention of the legislature to draw a distinction between the candidate on the one hand and his nominators or assentors on the other. The objection taken here is that the persons signing the nomination paper were not the same persons as those on the burgess roll; but I do not think that the slightest doubt can be reasonably entertained that the description of the assenting burgesses was such as to be commonly understood, or that they were the same persons as those who appeared on the burgess roll. There is nothing in the Act or the schedules requiring the full name of a burgess to be given, except in the entry in the burgess roll itself, and also except in the case of a candidate for the office of councillor, and in my opinion nominating and assenting burgesses may sign their names in the ordinary way. The question which we are asked must be answered in the negative.

STEPHEN, J. I am of the same opinion. The forms given in the eighth schedule differ considerably, and the form of nomination paper is the only one in the whole schedule where under the word "signature" initials only are inserted; and it seems to me to have been the obvious intention of the legislature that assentors might sign their names in the ordinary way. I put my judgment upon that ground only, and prefer to say nothing about s. 241, as to which I do not concur with the opinion expressed by my brother Manisty. I do not think that *Moorhouse*

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v. *Linney* (1) is applicable to the present case. There the error was in the burgess roll itself, and the correct signature in the nomination paper suggested another person by reason of the error in the roll; in the present case I think the signature would convey the required information.

Judgment for petitioners. Leave to appeal refused.

Solicitor for petitioners: *Harold Farman, for Dunn, Exeter.*

Solicitor for respondents: *Hammond, for Friend & Beal, Exeter.*

W. J. B.

Observations of LORD ESHER, M.R., at p. 319, *applied*. R. *v.* FULHAM, ETC., RENT TRIBUNAL. *Ex p.* PHILIPPE. [1950] 2 All E.R. 211.

[IN THE COURT OF APPEAL.]

May 31; *June* 23.

THE QUEEN *v.* THE COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX.

Revenue—Income Tax—Repayment of Income Tax—Computation of Profits—Time within which Overpayment must be proved—Jurisdiction of Income Tax Commissioners—5 & 6 Vict. c. 35, s. 133—"At the end of the year"—Mandamus.

By 5 & 6 Vict. c. 35, s. 133, "if within or at the end of the year" of assessment any person charged with income tax under Schedule D. "shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made that his profits during such year for which the computation was made fell short of the sum so computed," &c., it shall be lawful for the said Commissioners to cause the assessment to be amended as the case shall require and, in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for Special Purposes the amount of the sum overpaid upon such first assessment, and thereupon the last-mentioned Commissioners shall issue an order for the repayment of such sum as shall have been so overpaid, &c.

An English company, working mines abroad, made, in March, 1887, an application under the above section for certificates in respect of overpayments of income tax assessed on profits for the years ending respectively April 5, 1884, and April 5, 1885, and the Commissioners by whom the assessments were made having inquired into the case gave them certificates under the section. The Commissioners for Special Purposes refused to issue orders for repayment on such certificates on the ground that they were made without jurisdiction, the company not having found and proved "within or at the end of the year" as required by the section that their profits in the respective years fell short of the sum computed:—

Held, that the certificates given were valid; and that mandamus lay to

(1) 15 Q. B. D. 273.

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compel the Commissioners for Special Purposes to issue orders for repayment of the amounts certified to be overpaid.

The expression "at the end of the year" in the above section does not mean at any time after the end of the year, or, on the other hand, within any limit of time generally applicable, but as soon after the end of the year as, having regard to the circumstances of the particular case, is practicable by the use of due exertions.

By LORD ESHER, M.R. The Commissioners by whom the assessment was made are given by the section jurisdiction finally to determine whether the discovery and proof of the profits having fallen short of the sum computed has been made within the period specified in the section as above interpreted.

By LINDLEY, L.J. The Commissioners by whom the assessment was made having granted the certificate under the section, the onus of shewing that such discovery and proof were not made within the period above mentioned, and that the certificate was therefore invalid, rested on the Commissioners for Special Purposes, and was not satisfied by the mere fact of the application for the certificate not having been made before the date when it was made in the present case.

APPEAL from the order of the Queen's Bench Division, discharging a rule calling upon the Commissioners for Special Purposes of the Income Tax to shew cause why a mandamus should not issue commanding them to make orders for repayment to the Cape Copper Mining Company, Limited, of certain overpaid income tax pursuant to 5 & 6 Vict. c. 35, s. 133.

The facts are stated in the report of the case in the court below (20 Q. B. D. 549). It is sufficient to state them here briefly as follows:—

It appeared that in March, 1887, the company applied to the Income Tax Commissioners for the City of London for certificates under 5 & 6 Vict. c. 35, s. 133, entitling them to repayment of income tax alleged to have been overpaid in the years of assessment ending respectively April 5, 1884, April 5, 1885, and April 5, 1886. The Income Tax Commissioners for the City of London inquired into the claim, and granted a certificate for each year. Upon the case coming before the Commissioners for Special Purposes they made an order for repayment of the amount of the certificate given in respect of the assessment for the year ending 1886, but refused to make any orders upon the certificates given in respect of the other years, on the ground that they were given without jurisdiction, the discovery and proof of the profits having fallen short of the sum computed not having been made at the

end of the respective years of assessment within the meaning of s. 133 of 5 & 6 Vict. c. 35.

It appeared to be the practice of the Commissioners for Special Purposes to refuse claims for repayment of income tax unless made within a year from the end of the year of assessment to which they related.

The Divisional Court (Cave and Grantham, JJ.) was divided in opinion, Cave, J., thinking that the rule should be discharged, and Grantham, J., thinking that it should be made absolute; and, the latter learned judge withdrawing his judgment in accordance with the usual practice, the rule was discharged.

The applicants for the mandamus (the Cape Copper Company) appealed.

Sir H. Davey, Q.C., F. Meadows White, Q.C., and *Pollard,* for the applicants. The words "at the end of the year" in s. 133 of 5 & 6 Vict. c. 35, are equivalent to "at any time after the end of the year." The 10th section of 23 Vict. c. 14, imposes a period of limitation, viz., three years, on all claims in respect of overpayments of income tax, and there is no other limitation. The claim of the applicants was within the three years.

Mandamus will lie in this case. The application is not to enforce payment of money by the Crown but to compel the Commissioners for Special Purposes to perform a statutory duty, in which the applicants are interested, viz., to make the orders they are directed to make by s. 133.

Sir R. E. Webster, A.G., and *Sir E. Clarke, S.G.* (*T. Hewitt,* with them), for the Commissioners. The Commissioners for General Purposes acted without jurisdiction in giving certificates in respect of the years ending April, 1884, and April, 1885, the discovery and proof of the overpayments not having been made within the time mentioned by s. 133. The words "at the end of the year" in s. 133 cannot be construed as meaning "at any time after the end of the year." "At" is not the same as "after." It must be admitted that "at the end of the year" cannot mean immediately at the end of the year; but it must mean within a reasonable time after the end of the year, and it is for the Court to construe the section and to fix what would be such a time.

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The period fixed by the practice of the Commissioners, viz., a year from the end of the year of assessment, would be a reasonable limit. It is submitted that the Court cannot say, where the claims for repayment were not made till March, 1887, that discovery and proof of the overpayments were made, as required by the section, at the end of the years ending respectively April, 1884, and April, 1885.

The case is not one in which mandamus will lie; a petition of right is the only remedy. The application is substantially to compel the Crown to pay money, and is not one to compel performance of a statutory duty, the Act creating no duty as between the applicants and the Commissioners for Special Purposes. The Crown cannot direct a mandamus to itself or its servants acting merely as such. [On this latter point were cited: *Reg.* v. *Lords of the Treasury* (1); *Reg.* v. *Lords Commissioners of the Treasury* (2); *Reg.* v. *Commissioners of Woods and Forests* (3); *In re Nathan* (4); *Rex* v. *Lords Commissioners of the Treasury.* (5)]

Sir H. Davey, Q.C., in reply.

Cur. adv. vult.

1888. June 23. The following judgments were delivered:—

LORD ESHER, M.R. In this case the applicants had been assessed to and had paid income tax in respect of their business; and a considerable time afterwards they asserted that they had made an overpayment, and applied for repayment in respect thereof to the Income Tax Commissioners for General Purposes, who inquired into the facts of the case and gave to the applicants certificates under s. 133 of 5 & 6 Vict. c. 35. Upon those certificates being taken before the Commissioners for Special Purposes, and their being asked to issue orders for repayment of the amounts thereby certified as overpaid, they declined to do so on the ground that the Commissioners for General Purposes had no jurisdiction to give the certificates which they gave. An application was thereupon made to the Queen's Bench Division for a mandamus directing them to issue such orders. On this applica-

(1) 16 Q. B. 357.
(2) Law Rep. 7 Q. B. 387.
(3) 15 Q. B. 761.
(4) 12 Q. B. D. 461.
(5) 4 A. & E. 286.

tion the points which arise are that mandamus will not lie, and that the Commissioners for Special Purposes could not go behind the certificates and, if they could, they were wrong in contending that under the circumstances of the case the Commissioners for General Purposes had no jurisdiction. The judges in the Divisional Court, Cave and Grantham, JJ., were divided in opinion, but in accordance with the practice the junior judge withdrew his judgment, and the rule for a mandamus was discharged. With regard to the question whether mandamus will lie, I am of opinion that the case falls within the class of cases, where officials having a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. The remaining question is whether, supposing the remedy by mandamus to be applicable, the case is one in which the applicants are entitled to a mandamus. It is unnecessary in the view we take to decide the point whether the Commissioners for Special Purposes can decline to act on the certificate, as long as it exists, or whether the remedy, if it was wrongly made, was not to get it set aside on certiorari. The question whether the Commissioners for General Purposes had jurisdiction depends on the construction of the 133rd section of 5 & 6 Vict. c. 35. The objection taken is that these applicants did not find out and prove to the Commissioners the facts shewing the overpayment "within or at the end of the year" within the meaning of the section. It is clear that they did not do so "within" the year, so the question is whether they did so "at the end" of the year. It was admitted that "at the end of the year" cannot mean the very moment when the year ends; that it must indicate some more extended time. The one side contends that it means at any time after the end of the year, that is to say, that "at" and "after" for this purpose really mean the same thing. The other side contends that the words must be construed more strictly, and, though it is impossible to contend that they mean immediately on the year's ending, yet they must mean some limit as near as possible thereto to be decided by the Court on the construction of the words, and which would be generally applicable, and would not depend on the circumstances of each particular case. In my opinion neither of those views is

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correct. I think the section must receive a reasonable interpretation with regard to the exigencies of business. There may be many cases in which an overpayment might be made clear in a very short time after the end of a year, but in the case of mercantile people engaged in large concerns, carried on sometimes in different parts of the kingdom, and sometimes in foreign countries, and where there are complicated accounts, it would often be impossible to find out and prove the existence of overpayments in so short a time as would be sufficient in the case of an overcharge in respect of a single item, where there was no complication about the matter. It seems to me that we must give a meaning to these words elastic enough to make them fairly and reasonably applicable to the different cases to which they will have to be applied. I do not think, on the one hand, that they ought to be construed so widely as to make them equivalent to "at any time after the end of the year," or, on the other hand, that they ought to receive such a restrictive construction as suggested, or to be held to mean a single period which the Court is to determine, within which every case must be brought. I think they ought to receive such an interpretation as would make them applicable in a reasonable manner to the circumstances of each particular case. I think the proper construction of them is that they mean that the overpayment must be found out and proved in as short a time after the end of the year as is possible in the particular case with exertion on the part of the person claiming repayment. I will not say that the statute simply means within a reasonable time after the end of the year. I think it must be the shortest time in which it could be done if every exertion was made that ought to be made. If a person makes delay in examining into his affairs so as to exceed this time, though such delay may be not unreasonable, still I think he would be too late. His case would not in my opinion come within the meaning of the words "at the end of the year" as used in the section. If, on the contrary, the person claiming repayment has made every exertion which he ought to have made, then it does not follow, because several months or even a year or even two years have elapsed from the end of the year, that he is too late: if he could not have taken less time than he has, I think he would have satisfied the

terms of the section. This view of the section involves the result that the question, whether the party claiming has so satisfied the terms of the section, must be the subject of inquiry with reference to the particular circumstances in each case. I have been laying down what in my opinion is the general rule of conduct for those charged with that inquiry, but the question arises who are to make that inquiry. In the first instance obviously the Commissioners for General Purposes. They have to determine that question, and they must determine it, as it seems to me, according to the rule I have laid down. But when they have determined it, can their decision be questioned afterwards? It will be said on the one side that their jurisdiction depends on the decision of that question and, applying a well-known formula, that they cannot give themselves jurisdiction by a wrong decision on the facts. I have considered that formula with great care and, though it is correct enough for certain purposes, I think its application is often misleading. When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give

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themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction. In this case I think the Act gave the Commissioners for General Purposes jurisdiction to inquire into and finally determine the question whether the applicant has brought his case within the terms "at the end of the year" interpreted in the sense I have mentioned. If they determine that he has not, then they cannot proceed further in the matter. If they find that he has, then they must go further and exercise their jurisdiction with regard to overpayment, and there is no appeal from their decision. It may be perhaps more satisfactory that I should state that, if I thought that we had to determine that question, I should be of opinion that the Crown had not brought forward any facts which shewed that the Commissioners for General Purposes had decided wrongly on this question. For these reasons I think that the appeal should be allowed, and the rule for a mandamus made absolute.

LINDLEY, L.J. I have come to the same conclusion as the Master of the Rolls. The question we have to decide, apart from the question whether mandamus will lie, which I will deal with hereafter, turns on the construction of s. 133 of 5 & 6 Vict. c. 35. That section was amended by 28 & 29 Vict. c. 30, s. 6, and must also be taken in conjunction with s. 10 of the 23 Vict. c. 14, which limits the time within which claims for the repayment of duty may be allowed. I do not think, however, that the later sections have any application to the matter we are now considering, and the question really turns on the construction of the words of s. 133. The contention of the Commissioners for Special Purposes in substance is that the applicants did not within the meaning of the section find out and prove "at the end of the year" that their profits had fallen short of the sum computed. In order to determine that question we must construe those words of the section. It is conceded and it is obvious that

"at the end of the year" cannot mean the moment that the clock strikes twelve at the expiration of the current year. So to construe the section would practically be to strike out the words "at the end of the year" altogether. Therefore some construction short of that must be put on the words. We must, I think, consider how the provision can be worked as a matter of business. It is applicable to all sorts of persons, not only to persons engaged in professions and trades in this country, but to bodies who, like this company, have an office here and are working mines or other such undertakings abroad. I think the true view of the words is that which has been stated by the Master of the Rolls, viz., that they mean as soon after the end of the year as is practicable, having regard to the facts and circumstances of the particular case, and to the obligation to use due diligence. I do not think it would be sufficient that what is required should be done in a "reasonable" time, after the end of the year, unless the term "reasonable" be held to imply the use of diligence. That being in my opinion the true meaning of the words, what are the facts in this case? Those who represented the company went before the Commissioners and satisfied them that there had been over-payments in respect of income tax, and I suppose they must have satisfied them, provisionally at all events, that they had ascertained and proved that to be the case with reasonable diligence. At any rate they got certificates from them. I think that getting such a certificate places them in a better position than before. The Commissioners for Special Purposes cannot take up any ground which will avail them short of contending that the certificate was given without jurisdiction. How can they establish that contention? If the view is correct that the Commissioners for General Purposes are the judges to determine finally whether the applicants had satisfied the condition as to time imposed by the words of the section, then that decision is binding on the Commissioners for Special Purposes and there is no appeal. Having regard to the terms of s. 133, I must admit that I doubt whether the Commissioners for General Purposes are made the final judges of that question. But supposing that they are not, I think that, the certificate having been granted, the presumption is in favour of its validity, and the onus of proving that the Commissioners for General Purposes exceeded their jurisdiction is

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THE QUEEN v. COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX.

Lindley, L.J.

thrown on those seeking to impeach its validity; and it lies on them to shew that the applicants did not find or prove what is requisite under the section "at the end of the year." What evidence in this case have they shewn of this? Absolutely nothing but the mere dates: and on those we are asked to hold as a matter of law that the case was not within the section. Whether we ought to do so or not appears to depend to a great extent on what is the true interpretation of the words as used in the section. It seems to me that, taking the interpretation of the words to be what I have before stated, the Commissioners for Special Purposes have entirely failed to shew that the period contemplated by the section has been exceeded. The mere fact of the application by the company to the General Commissioners not having been made till it was does not shew that it was not made as soon as was practicable having regard to the circumstances of the case. The result is that the certificates must be treated as valid and the applicants are entitled to succeed. Interpreting the section as I do, I think the view expressed by Cave, J., in the court below as to the interpretation of the section more correct than that taken by Grantham, J., but I think the former did not give sufficient weight to the fact of the certificates having been obtained.

With regard to the question whether mandamus would lie, I have looked into the authorities and I come to the conclusion that the case is one in which it will lie. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile: but I think that the counsel for the applicants were right in saying that the application is not to enforce payment of money by the Crown, but to enforce the making of an order by the Commissioners which it is the duty of the Commissioners to make, and without which the repayment cannot be obtained. I think the case comes within the principle of the cases of *Reg.* v. *Lords of the Treasury* (1), and *Reg.* v. *Commissioners of Woods and Forests* (2), and not within the cases cited for the Crown. For these reasons I think the appeal should be allowed.

Appeal allowed.

Solicitor for applicants: *J. Sheppard.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

(1) 16 Q. B. 357.

(2) 15 Q. B. 767.

E. L.

[IN THE COURT OF APPEAL.]

1888
July 12, 14.

McGOUGH *v.* THE LANCASTER BURIAL BOARD.

Burial Board—15 & 16 *Vict. c.* 85, *ss.* 33, 38—*Right of Burial, what included in*—*Erections on Grave*—*General Control of Burial Board.*

The defendants, a burial board, had provided a burial-ground under 15 & 16 Vict. c. 85. By s. 33 of that Act the burial board are empowered to sell the exclusive right of burial in any part of their burial-ground, the right of constructing any vault or place of burial, and also the right of erecting any monument, gravestone, tablet or monumental inscription in such burial-ground. By s. 38 the general management, regulation, and control of the burial-ground are vested in the burial board.

For the purpose of burying a deceased daughter, the plaintiff purchased from the defendants, and they conveyed to him, "the exclusive right of burial" in a grave space in their burial-ground in perpetuity; and they also granted him the right to erect a gravestone on the grave. He afterwards placed upon the grave a wreath and, to protect it, a glass shade covered with a wire frame. It was the general rule of the defendants never to allow the placing of such glass shades on the graves in their burial-ground, and accordingly the defendants removed the glass shade and wire frame without the consent of the plaintiff:—

Held, that the plaintiff had only acquired such rights as, under s. 33, the defendants were empowered to sell; that such rights did not include a right to place the glass shade and wire covering on the grave; and that, in the exercise of the control vested in them by s. 38, the defendants were entitled to remove the same.

APPEAL from the judgment of the Queen's Bench Division on appeal from the Lancaster County Court.

The facts were as follows:—

The plaintiff had, for the purpose of burying a deceased daughter, purchased a grave in a cemetery provided by the defendants under the provisions of 15 & 16 Vict. c. 85, as extended by 16 & 17 Vict. c. 134, s. 7. The conveyance executed by the defendants purported to grant to the plaintiff, his heirs and assigns, in consideration of a payment of 1*l.* 1*s.* "the exclusive right of burial in the grave space numbered, &c. (describing it) to hold the same to the plaintiff, his heirs and assigns, in perpetuity for the purpose of burial," subject to payment of certain fees, and "subject to the regulations now in force or which may be hereafter issued with regard to interments in the said cemetery

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by Her Majesty's Secretary of State or the burial board or other competent authority."

The defendants had issued certain rules which contained, inter alia, provisions with regard to the erection of monuments and gravestones in the cemetery, and the fees to be taken upon the erection of such. The plaintiff obtained from the defendants leave to erect a monument or gravestone over the grave, which he accordingly did. He afterwards placed upon the grave a wreath (though whether on the gravestone itself or not did not appear), and, to protect it, a glass shade with a galvanized wire covering. It appeared that the defendants made it a general rule never to allow the placing of glass shades upon the graves in their cemetery, and accordingly they removed the glass shade and covering so erected by the plaintiff, without his consent. Thereupon the plaintiff brought an action against them in the county court for so doing. The county court judge found that the shade and covering, which had been removed, were of a kind which it was usual and customary to place on graves in burial-grounds; and he decided that the defendants had no right to remove them. He therefore gave judgment against them for nominal damages and costs. On appeal to the Queen's Bench Division the Divisional Court (Wills and Grantham, JJ.) reversed his decision, and allowed the appeal. (1)

Crompton, Q.C., for the plaintiff. It is not necessary to contend that the conveyance of the exclusive right of burial by the

(1) 15 & 16 Vict. c. 85, provides as follows:—Sect. 33: "Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial-ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet or monumental inscription in such burial-ground. . . ."

Sect. 38: "The general management, regulation, and control of the burial-grounds provided under this Act shall, subject to the provisions of this Act and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same; provided that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portions of such grounds shall be determined by the bishop of the diocese."

defendants passed a freehold in the soil to the plaintiff. It is contended that by such a conveyance an incorporeal right of burial together with a right of occupancy so far as necessary for the purpose of burial passes. The grant of the right of burial and of erecting a gravestone must be construed to include everything reasonably and usually incidental thereto, such as the placing of a suitable inscription on the stone, or any usual and unobjectionable ornaments of a grave, such as plants, flowers, &c. The county court judge finds that the glass shade and wire covering were of this nature. [He cited *Ashby* v. *Harris* (1); *Matthews* v. *Jeffrey* (2); *Spooner* v. *Brewster*. (3)]

R. O. B. Lane, for the defendants. The rights of the plaintiff must be measured by the terms of the grant made to him by virtue of the statute. The grant is of the "exclusive right of burial" and only includes what is necessary for the purposes of burial. It cannot be said to be necessary for the purposes of burial that the plaintiff should be allowed to put up a glass shade over the grave.

[He was then stopped by the Court.]

Lord Esher, M.R. I cannot agree with the view taken by the county court judge in this case. He has spoken of the right of property belonging to the plaintiff in the grave beyond the mere right of burial. It seems to me that the plaintiff had only statutory rights in this grave; the burial board could only grant him what the statute empowers them to grant him. The rights the board can confer on him are mentioned in the 33rd section of 15 & 16 Vict. c. 85. By that section they are not empowered to grant a freehold estate in a part of the burial-ground. They are empowered to sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial-ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein, in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in such burial-ground. Those are the rights which

(1) Law Rep. 3 C. P. 523. (2) 6 Q. B. D. 290.
(3) 3 Bing. 136.

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Lord Esher, M.R.

they are empowered to sell, and it appears to me that an attempt to grant anything further would be void. That being so, what are the rights which have been granted to the plaintiff? The conveyance grants to him the exclusive right of burial in a certain grave space, and I will take it that he had obtained, though how was not very distinctly shewn, for I do not think it would be included in the conveyance, the right of erecting a monument or gravestone. Those rights he exercised, and he further proceeded to put up the glass shade for the purpose of protecting a wreath placed over the grave, and a wire covering for such shade. It seems to me that he had no legal right granted to him to do anything more than to bury his dead in that place, and to put up a gravestone, and that he had no right given him to put up any other structure in addition thereto. Again, by the 38th section of 15 & 16 Vict. c. 85, the burial board are given a general control over the cemetery, and I cannot find that there is any appeal from the mode in which they think fit to exercise that control. It is true that it is to be a general control, so that I doubt whether they could prevent one person from doing what they allowed another person to do: but it appears that they have exercised such general control by never allowing glass shades of this kind to be placed on the graves in their cemetery, and I think that under s. 38 they were entitled so to exercise it. For these reasons I think that the judgment of the Court below was correct, and that this appeal must be dismissed.

Lindley, L.J. I think that this case really turns on ss. 33 and 38 of 15 & 16 Vict. c. 85. The 33rd section enables the board, under such restrictions and conditions as they think proper, to sell the exclusive right of burial in any part of their burial-ground either in perpetuity or for a limited term. By s. 38 it is provided that the general management, regulation, and control of the burial-grounds provided under the Act shall, subject to the provisions of the Act and the regulations to be made thereunder, be vested in and exercised by the respective burial-boards providing the same. This latter section appears to me not only to give to the board the right, but to impose upon them the duty of exercising a general control over the burial-ground,

and acting as custodians of it. They have granted to the plaintiff an exclusive right of burial in a certain grave space, subject to the regulations now in force, or which may hereafter be issued by the Secretary of State, or the board or other competent authority. I cannot altogether disregard these latter words, and I think it going rather far to say, as Willes, J., appears to have said in *Ashby* v. *Harris* (1), that such words must be disregarded as repugnant or void. It seems to me impossible to say that a general rule forbidding the use of glass shades and wire frames such as these on graves goes beyond the powers given to the board by s. 38. As I understand they do not object to wreaths. This is not a case in which the board have changed their minds, and are now objecting to what they had previously allowed. They have always forbidden erections of this kind. Therefore the case does not seem to come within the authority of *Ashby* v. *Harris* (1), where it was held that the grant must be taken under the circumstances to imply a right to keep in order and renew the plants which had been originally permitted to be planted as part of the monument erected under the terms of the grant. I think that decision goes rather far, but it does not seem to me to be in point. This is not a question of the right to keep in repair and maintain that which must be taken to have been erected under the grant. It seems to me that in law the plaintiff's action was not maintainable.

Bowen, L.J. I also think that we cannot interfere with the action of the burial board. There has been considerable discussion during the argument as to the character of the right which the plaintiff has under the grant to him by the defendants. The truth is that it is a statutory right which must be measured by and interpreted with relation to the statute. It is worth while considering for a little, with a view to the construction of the statute, what rights exist at common law in the case of the burial of a parishioner in a parish churchyard, because the general purpose of the Act is to provide cemeteries in substitution for parish churchyards. It appears that at common law the freehold of the parish churchyard, as well as the church, is vested in the

(1) Law Rep. 3 C. P. 523.

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incumbent, and, subject to certain personal rights belonging to himself, the object for which he so holds it is the burial of the parishioners. The erection of monuments in the churchyard in the ordinary course is a matter of habitual practice, but as a matter of law, strictly speaking, the consent of the ordinary would seem to be a necessary condition of the legality of their erection; and, therefore, what Coke says (1), as to the erection of monuments to the deceased in church or churchyard in a convenient manner being lawful, must be taken subject to the reservation pointed out by Lord Stowell in *Maidman* v. *Malpas* (2), viz. that the convenience of the erection is to be judged of by the ordinary. It is true that, as a matter of practice, where the incumbent's consent has been obtained in the first instance, the consent of the ordinary is to be implied, and after the lapse of a reasonable time must be taken to have been given. Therefore it is to be observed that the law does not give the parishioner power to decide what shall be placed on the grave, but the ultimate control over that is at common law reserved to the ordinary. That being so, one would expect to find that the legislature, in passing the Burial Acts, under which cemeteries were to be created to take the place of churchyards, would reserve to some authority a control analogous to that exercised by the ecclesiastical authorities at common law over churchyards. The Act, 15 & 16 Vict. c. 85, defines in s. 33, what the burial board may grant, and in s. 38 it provides in whom the general control of the cemetery is to be vested. It appears to me that this case depends on those two sections. The right to be given under s. 33 is a statutory right and the matter appears to me to be only complicated by considering whether it can be called a freehold or not. The board may sell an exclusive right of burial, subject to such restrictions as they think proper. They may also sell the right to construct a vault or place of burial, and lastly they may sell the right of erecting a monument or gravestone. It seems to me that, the board being expressly given the right of doing these three things, it follows that the first of them cannot include the third ex vi termini. Therefore the exclusive right of burial cannot be considered as including as incident

(1) 3 Inst. 202.

(2) 1 Hagg. Cons. 205, at p. 207.

thereto the right of erecting a gravestone, and a person buying the former cannot be considered as thereby buying the latter. Of course he may buy the latter as well as the former. What has the plaintiff bought here? He has bought a right of burial, subject to restrictions which the board were empowered by s. 33 to impose. The grant is expressed to be subject to payment of certain fees, and the regulations now in force or thereafter to be issued by the Secretary of State or the board or other competent authority. In the present case I also assume, though it was not distinctly proved, that he either bought the right, or had in some way obtained from the board an irrevocable licence, to have a gravestone on the grave. But certainly he has not bought the right to put a glass shade with a wire frame over the grave, however unobjectionable such a structure might be. It was argued that in *Ashby* v. *Harris* (1) it was decided that the right to place flowers or plant shrubs over the grave was incidental to the right of burial. As to that I say nothing, for it does not appear to me to touch this case. Moreover, the board are by s. 38 given a general control over the cemetery, and they have exercised their functions under the section by generally forbidding what the plaintiff did in the present case. If the case stood on s. 38 alone, I think the plaintiff must fail. But I think that s. 33 is equally fatal to his claim, for I do not think that having regard to the terms of that section he had obtained the right which he claimed to have.

Appeal dismissed.

Solicitors for the plaintiff: *Tahourdin & Hargreaves, for Johnson & Tilly.*

Solicitors for the defendants: *Brownlow & Howe, for Swainson, Son & Roper.*

(1) Law Rep. 3 C. P. 523.

E. L.

1888
July 6.

[IN THE COURT OF APPEAL.]

MASSEY AND ANOTHER *v.* HEYNES & Co. AND SCHENKER & Co.

Practice—Notice of Writ—Service out of the Jurisdiction—"Proper" Parties—Order XI., r. 1 (g).

By Order XI., r. 1, service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever (*g*) "Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

In an action against defendants in London for breach of warranty of authority it appeared that they had assumed as agents for foreign principals to enter into a contract to be performed out of the jurisdiction, and that there had been a breach out of the jurisdiction, the supposed principals having repudiated the contract as being made without their authority:—

Held (affirming the judgment of the Queen's Bench Division), that the foreign principals were "proper" parties to the action within Order XI., r. 1 (*g*), and that service on them out of the jurisdiction of notice of the writ might be allowed.

MOTION that an order giving the plaintiffs liberty to issue a concurrent writ, and serve notice thereof abroad, together with the writ and judgment, and all other proceedings thereunder, might be set aside so far as the defendants Schenker & Co. were concerned.

It appeared that Schenker & Co., who were Austrian subjects, in business as merchants at Fiume, gave telegraphic instructions to the defendants, Heynes & Co., shipbrokers in London, to effect a charterparty, who accordingly made a charterparty with the plaintiffs, shipowners in London, which was to be performed in the Mediterranean.

Schenker & Co. afterwards repudiated the charterparty, on the ground that it was not in the form authorized by them. The plaintiffs brought the action against Heynes & Co. for breach of implied warranty of authority to effect the charterparty, and obtained an order for leave to serve notice of the writ on Schenker & Co. abroad, in order to claim against them for breach of the charterparty in the same action. Notice of the writ having been served, judgment by default was signed against Schenker & Co. An application by Schenker & Co. in the terms of the motion

was refused by Denman, J., in chambers. The defendants, Schenker & Co., appealed.

F. W. Hollams, for the defendants Schenker & Co. The sub-section of Order XI., r. 1, under which service out of the jurisdiction may be allowed, on which the plaintiffs rely to support the order, is sub-s. (*g*) (1). But it does not apply to mere alternative remedies against two defendants. The plaintiffs must shew that both defendants can be made liable in the action. The Austrian firm can, however, only be liable on the assumption that there is not a cause of action against the defendants within the jurisdiction. If the charterparty binds the Austrian firm, their London agents are not liable; on the other hand, if it was made without authority, the Austrian firm are not liable for the breach of it. They cannot be made parties to the action merely in order to obtain discovery: *Wilson* v. *Church*. (2)

W. English Harrison, for the plaintiffs. The foreign firm are "proper" parties within Order XI., r. 1 (*g*), which is not limited to joint defendants. Either firm may be liable. The plaintiffs cannot obtain the original correspondence between the Austrian firm and their agents, on which the case depends, unless the Austrian firm is made party to the action. The decision in *Wilson* v. *Church* (2) was only that an officer of a corporation was improperly joined with the corporation as a defendant for the purpose of discovery, inasmuch as the discovery could be obtained by an order to interrogate him. That case, therefore, does not apply.

Hollams, in reply. The person abroad who may be served must be a proper party to "an action" properly brought against some other person within the jurisdiction. The action in this

(1) Order XI., r. 1, provides that service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever—

"(*e.*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or,

"(*g.*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

(2) 9 Ch. D. 552.

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case is for breach of warranty of authority, but the Austrian firm is not a proper party to such action. There is no case on the point except *Sykes* v. *Scholfield* (1), in which it was held that, if the party to be served is a "proper" party, he need not also be a "necessary" one. [He also argued that the judgment should be set aside and leave given to Schenker & Co. to appear and defend the action.]

Cur. adv. vult.

1888. June 1. WILLS, J. This is an application to set aside service of notice of a writ issued in England out of the High Court against two defendants, one being a firm of English ship-brokers, the other a foreign firm resident and carrying on business at Fiume, in Austria, in respect of a contract the breach of which was not in England, and as to which, therefore, the Austrian firm could not have been made defendants under Order XI., r. 1, s. (*e*), to an action in this country. The service of the notice of the writ must therefore be justified, if at all, by sub-s. (*g*) of the same order and rule, and that is the only ground on which the leave for service was obtained. Order XI., r. 1, provides that service out of the jurisdiction may be allowed whenever—"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The nature of the complaint in the present case against the two separate sets of defendants was this: The brokers in England had undoubtedly been instructed by the firm abroad to make a charterparty in England. The brokers made a charterparty with the plaintiffs which had to be performed in the Mediterranean, and was there broken. On complaint made to the defendants abroad, they answered that the brokers in England had exceeded their authority in effecting the charter-party in the terms which it contained, and therefore that the foreign firm was not liable. Thus two sets of persons were involved in the transaction, against whom the plaintiffs had no joint remedy or joint cause of action, but in respect of each of whom the suggested cause of action against one excluded that against the other: for if the firm abroad had given authority to

(1) 28 Sol. J. 477.

the brokers in London to make this charterparty, no action would lie against the brokers; if, on the other hand, the firm had not given authority to the brokers, no action would lie against the Austrian firm, but an action would lie against the brokers for breach of their implied warranty of authority. So that perhaps no case could be put in which the objections which have been raised to the service out of the jurisdiction would be more strikingly illustrated. The Austrian firm certainly could not have been served alone, because under none of the sub-sections of Order XI., r. 1, would a case for service out of the jurisdiction against them arise. Also, if the action succeeded against the foreign firm, it would be on the ground that the English defendants were not liable, and therefore, in one sense, ought not to have been sued.

The question, therefore, is whether, under these circumstances, the foreign firm can be said to be "proper" parties to "an action properly brought against some other person duly served within the jurisdiction." The words "other person duly served within the jurisdiction" are satisfied by the service on the brokers in England. The action against them is, no doubt, "properly brought." Then what is meant by the words person who is a "proper party to an action"? It is quite clear that he may be a "proper" party without being a "necessary" party, for the words are used in the alternative. It was not suggested that there were any persons who according to the practice of our Courts would be "proper" and yet not "necessary" parties, apart from the new practice introduced by the Judicature Act and Rules, under which alternative claims against defendants arising out of the same transactions can now be prosecuted by means of the same writ and proceedings; and I am myself unable to point out any instances where, under the old practice, persons would be "proper" parties without being "necessary" parties. It may be that under the Chancery Practice there are such persons, and that my information is imperfect on the subject, but no instances of such persons have been given in argument. Therefore it seems to me that the word "proper," which is not a technical but a descriptive word, must have been directed towards such cases as the present, and intended to enable persons to be made

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Wills, J.

parties who under the old practice could not be served with the same writ, and whose cases are mutually exclusive. The injustice and hardships of dealing with them in separate actions gave rise to Order XVI., which provides for alternative claims in the same action. Before that provision was made, great injustice often arose because a plaintiff did not know, and could not find out, amongst the several persons involved in a transaction, who was really liable, when certainly some one of them was so, and the persons themselves knew where the truth lay, yet it was their interest to conceal it. Often a plaintiff could not get redress from the real defendant until the plaintiff had gone through the expensive and troublesome process of suing them separately and failing against one or more of them. Order XVI. was meant to get rid of that state of things. If a person is mixed up in a transaction carried out in this country by English subjects, I see no reason why he should not be dealt with for the purposes of service of process as if he was amenable to the jurisdiction of the Courts here. If he does not choose to submit to the jurisdiction he must take his chance, and no remedy will be effective against him unless he has property in this country. I see no particular hardship in saying that he must come to the courts of this country if he wishes to defend himself. Of course if any clear principle of international law or comity existed for construing the rules otherwise than according to the natural meaning of the words used there would be some reason for doing so, but there is no such reason. I think the rule was intended to apply precisely to this class of case. It is clear that it is no objection to our construction of the rule that the case does not come within sub-s. (*e*), for if sub-s. (*g*) did not deal with something not dealt with in sub-s. (*e*) there was no reason for sub-s. (*g*). Of course the jurisdiction must be exercised with care and forbearance, but ample power is given to the Court to prevent abuse of the process by the limitation carefully inserted in sub-s. (*g*), that the person sought to be made a defendant must be a "proper" party to an action "properly brought" against some other party in this country. If there was the least ground for saying the action was brought against the brokers in this country malâ fide, and with the knowledge that they were not liable, simply to try in

England a case which otherwise could not be tried here, then although the action was against a person in this country it would not be "properly" brought. The Court must be satisfied of bona fides before the jurisdiction ought to be exercised, and the Court must be further satisfied that the person to be served abroad is a "proper party." It is hard to define it exhaustively, but I think that if according to the regular practice of the Courts of this country—supposing all parties subject to the jurisdiction—the person to be served is one who as a matter of course would be joined on the same writ and be treated as one of the defendants in the action, he is a "proper," if not a "necessary," party to the action.

Such is my opinion on the construction of the rule. Is there any authority on the point? There are only two cases, one, *Yorkshire Tannery and Boot Manufactory, Limited* v. *Eglinton Chemical Co., Limited* (1), which, however, does not throw much light on this case, for the decision was on the purely technical ground that the defendant within the jurisdiction had not been served at the time when leave to serve the person outside the jurisdiction was asked, and therefore Pearson, J., held that it was not an action already properly brought against a person within the jurisdiction, and the provisions of Order XI., r. 1 (*g*), had not been satisfied. But the judgment contains observations in which I entirely concur, to the effect that both the persons abroad to be joined as defendants and the persons sought to be sued in this country must be parties really and substantially concerned with the questions to be litigated, and I do not think that the observation goes further than this, viz., that the jurisdiction must be carefully exercised, and the Court must see that persons are not to be unreasonably and malâ fide sued as British subjects here in order to make a case under sub-s. (*g*) against a foreigner abroad. There is another case much nearer the present one, and which, although different in circumstances, is not different in principle: *Sykes* v. *Scholfield.* (2) We have obtained the original affidavits and order of court in that case that we might ascertain exactly how it stood. It was an action brought on the promissory note of a person in New York who could not have been sued alone in

(1) 54 L. J. (Ch.) 81.

(2) 28 Sol. J. 477.

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this country; there were no circumstances to bring him within the other sub-sections of Order XI., r. 1, and therefore the jurisdiction to add him as a defendant depended entirely on sub-s. (*g*). One of the indorsees was an accountant in Dewsbury, and therefore the action against him was properly brought in England, and an application was made to amend the writ by adding the person abroad, and giving leave to serve him in New York. That was a case of two actions substantially joined in the same writ. It is true that they were not mutually exclusive causes of action; they were concurrent, but separate and distinct, and if the fact that the person in New York could not have been sued alone was a good objection, the order would not have been made; but although there is that distinction of circumstance there is no distinction in principle. According to the practice and system of the Courts in this country both of the defendants if resident here might have been sued in this country, but were not necessary parties to the action. So both answered to the description of "proper" parties to the action. That case tends to support our decision in this case. [The learned judge then examined the merits of the application on affidavits to set aside the judgment signed, and refused to set it aside.]

GRANTHAM, J. I am of the same opinion. It is clear that one of the objects of the legislature in passing the Judicature Acts and Rules was to do away with the technical objections that the wrong person was sued or that some one else might have been made a defendant, although the plaintiff had no means of finding it out, and to remedy those evils the rules in Order XVI., must have been passed. They prescribe, inter alia, that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment:" rule 4. Then, that every defendant need not be interested as to all the relief prayed for: rule 5; and that the plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including

parties to bills of exchange and promissory notes: rule 6. Then comes rule 7: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." It is possible that in the present case the firm in England and the firm in Austria might have cast the liability on each other, and so framed their case that whoever was made sole defendant might have succeeded by shewing that the whole responsibility was on the other. I think that rule 7 was intended to meet such a case. But then comes the question whether the same principle can be adopted where one of the parties is resident abroad? It is clear that he could not be sued in this case except for the special rule (*g*) of Order XI., r. 1. I think we could not possibly have had a better case to shew the expediency of such a rule. Any injustice in bringing in a party resident out of the jurisdiction will be prevented by the necessity for an application to the Court, which must no doubt exercise great care in allowing service abroad. It seemed at first that the English firm might have been made defendants simply in order to bring in the foreign principals, but on the facts it is clear that the plaintiffs had no such intention, but had a real difficulty, viz., they had not the means of knowing whether the repudiation of the charterparty by the foreign firm was justified or not. I think that the plaintiffs could not do better than bring both parties before the Court, in order that the "question which, if any, of the defendants is liable, and to what extent, may be determined as between all parties."

J. R.

From this decision the defendants Schenker & Co. appealed to the Court of Appeal.

1888. July 6. *Gorell Barnes, Q.C.*, and *F. W. Hollams*, for the appellants.

French, Q.C., and *W. English Harrison*, for the plaintiffs, were not heard upon the question of the service of the writ.

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The arguments were in substance the same as those in the Divisional Court, and the same cases were cited, and also *Re Steamship Thanemore, Limited* v. *Thompson* (1) and *Speller & Co.* v. *Bristol Steam Navigation Co.* (2)

LORD ESHER, M.R. The question is, what is the true construction of rule 1 (*g*) of Order XI. According to our present practice in such a case as this, there being one transaction, and the plaintiff having an alternative remedy against one or other of two persons, he is entitled to claim relief in the same action alternatively against one or the other of the two,—to state facts which, if his allegations are true, shew that he is entitled to this alternative relief against one or other of the two parties who have been concerned in the one transaction. To what period of time does the rule in question apply? It must certainly apply to the time of the service of the writ or notice of the writ. How can the Court deal with the case then? Not according to the result of the trial of the action; they cannot take into account what may be the result of the trial, or they could never decide who would be a "proper party" to the action until the trial was over. The question, whether a person out of the jurisdiction is a "proper party" to an action against a person who has been served within the jurisdiction, must depend on this,—supposing both parties had been within the jurisdiction would they both have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction. This is the legislation on the subject, and we are bound by it. It is admitted by the appellants that they gave authority to Heynes & Co. to make a charterparty, but they say that Heynes & Co. exceeded their authority.

LINDLEY, L.J. I have no doubt that the rule applies to such a case as this. When the liability of several persons depends upon one investigation, I think they are all "proper parties" to the same action, and, if one of them is a foreigner residing out of the jurisdiction, rule 1 (*g*) of Order XI. applies.

(1) 52 L. T. (N.S.) 552. (2) 13 Q. B. D. 96.

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LOPES, L.J. At what time must it be determined whether a person is a "proper party" to an action? Clearly, I think, at the time when the writ is issued. The words "an action properly brought against some other person" evidently point to that. If both these parties were within the jurisdiction it could not be contended that they were not both "proper parties" to the action. As one of them is out of the jurisdiction, I can see no reason why the rule should not apply.

Appeal dismissed.

Solicitors for appellants: *Waltons, Bubb, & Johnson.*
Solicitors for respondents: *Botterell & Roche.*

W. L. C.

CLERICAL, MEDICAL AND GENERAL LIFE ASSURANCE SOCIETY *v.* CARTER (SURVEYOR OF TAXES).

July 2, 3, 16.

Revenue—Income Tax—Interest—Profits and Gains—Chargeability of Interest arising from Investments made for the Purpose of carrying on a Business—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 163—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*

The amount of interest arising from investments made by an insurance company for the purpose of carrying on their business on which income tax had been deducted at its source amounted to more than the profits of the company for the year of assessment, but the company had during the year received interest from investments on which income tax had not been deducted at its source:—

Held, that under s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35) (1), and sched. D of s. 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the company were liable to pay income tax on the interest from which income tax had not been deducted at its source.

Last v. *London Assurance Corporation* (12 Q. B. D. 389; 14 Q. B. D. 239; 10 App. Cas. 438) considered.

CASE stated for the opinion of the Court under s. 9 of the Customs and Inland Revenue Act, 1874 (37 Vict. c. 16).

(1) By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102: "Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of . . . pence without deduction &c.;

"Provided that in every case where

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The following statement of the facts is taken from the judgment of Charles, J.

In this case the Clerical, Medical and General Life Assurance

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the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment; and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorized to deduct out of such annual payment at the rate of, &c.; and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money and under the penalty hereinafter contained; and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable;—

"But in every case where any annual payment as aforesaid shall, by reason of the same being charged on any property or security in the British plantations or in any other of Her Majesty's dominions, or on any foreign property, or foreign security, or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money shall not be reserved or charged or payable for the period of one year, then and in every such case there shall be charged upon such interest &c., the duty before mentioned."

By s. 163: "Provided always, . . . that any person charged or chargeable to the duties granted by this Act, either by assessment or by way of deduction from any rent, annuity, interest or other annual payment to which he may be entitled, who shall prove before the Commissioners for General Purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than one hundred and fifty pounds, shall be exempted from the said duties, and shall be entitled to be repaid the amount of all deductions or payments on account thereof in the manner hereinafter directed."

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2: "For the purpose of classifying and distinguishing the several properties, profits and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits and gains respectively described or comprised in the several schedules contained in this Act, and marked respectively (A) (B) (C) (D) and (E) and to be charged under

Society appealed to the Commissioners for General Purposes of the Income Tax Acts for Westminster against an assessment under schedule D of 16 & 17 Vict. c. 34, in the sum of 2000*l.* in respect of interest arising from securities belonging to the society on which the tax had not been deducted at its source, and which had not otherwise been specifically charged.

The society carries on the business of life insurance and derives a large portion of its income from interest on its investments. This interest, which includes the interest in question, from which the tax had not been deducted at its source, together with its other sources of income, is brought into the accounts of the society. Those accounts shew that after debiting all expenses of management and other outgoings there was for 1885–1886 an average net balance of profit not exceeding 74,250*l.* 12*s.* 7*d.* The society had, however, paid by way of deductions income tax on 107,378*l.* 13*s.* 8*d.* in respect of interest derived from its investments. They stated that the interest which had escaped taxation at its source did not amount to the sum assessed, but admitted that they had received 165*l.* in respect of interest from securities in full without deduction for income tax. The Commissioners thereupon reduced the assessment to the amount actually received,

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such respective schedules, that is to say,

. . . . . .

Schedule (C).

For and in respect of all profits arising from interest, annuities, dividends and shares of annuities payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue.

Schedule (D).

For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere:

And for and in respect of the annual profits or gains arising or accruing to any person whatsoever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom:

And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act.

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viz. 165*l.*, but refused to discharge it altogether. The society, who contended that the assessment should be discharged altogether on the ground that income tax was already over-paid, declared their dissatisfaction with the decision of the Commissioners and required them to state this case for the opinion of the Court.

Finlay, Q.C. (*Sir H. Davey*, Q.C., and *A. T. Lawrence*, with him), for the appellants. The appellants are not liable to pay income tax on the sum in question. They have already paid income tax on a sum exceeding the profits of their business. As a result of the decision of the House of Lords in *Last* v. *London Corporation* (1) it was admitted by the Income Tax Commissioners that where, as in that case, an insurance company had during a year paid in deductions at the source on interest on investments made for the purposes of carrying on their business a larger sum than the amount of their profits for the year, the company had overpaid income tax to the extent of the difference. The principle of this admission applies to the present case. The intention of the legislature is to charge business profits. Interest received on money invested in order to form a fund necessary for the carrying on of a business, does not come under the description of "profits and gains." The respondents rely on 5 & 6 Vict. c. 35, s. 102, and 16 & 17 Vict. c. 34, s. 2, schedule D. The former section is, however, not a charging section: *Foley* v. *Fletcher*. (2) As to the latter the expression "interest" is limited by "profits and gains" in the context, and does not refer to interest which is used for the purpose of making "profits and gains."

A. V. Dicey, (*Sir R. E. Webster*, A.G., and *Sir E. Clarke*, S.G., with him), for the respondents. The last clause of schedule D in 16 & 17 Vict. c. 34, is an addition to the original schedule D in 5 & 6 Vict. c. 35, s. 1. The additional clause expressly charges the sum in question with income tax. That sum consists of "interest of money . . . . not charged by virtue of any of the other schedules." The words "interest . . . . and other annual profits or gains" shew that "interest" is itself a "profit and gain" liable to assessment. The last clause in 5 & 6 Vict. c. 35,

(1) 10 App. Cas. 438. (2) 3 H. & N. 769; 28 L. J. (N.S.) (Ex.) 100.

s. 102, has the same effect. This clause enacts that in the case of colonial or foreign securities, where there can be no deduction at the source of income tax on the interest, the recipient is liable. The "profits and gains" of a business are a separate matter. The company have two sources of income, interest arising from investments, and profits arising from the business of life insurance, and they are liable to pay income tax in respect of both sources of income. A person derives 1000*l.* a year from consols, and also carries on a business. It is not unreasonable that he should, in any event, pay income tax on his certain income of 1000*l.* a year, and that the annual value of his business, which may yield a profit or result in a loss, should be treated as an altogether separate subject of assessment. If income tax is payable on interest by deduction at its source, clearly income tax is payable on interest which has come into the hands of the appellants without such deduction having been made.

As to the cases cited, in *Foley* v. *Fletcher* (1) the Crown was not represented, and in *Last* v. *London Assurance Corporation* (2) the question which is involved here, viz., whether interest which has escaped taxation at its source is liable to income tax, notwithstanding that the recipient has in the course of his business for the year paid income tax in deductions at the source on a larger sum arising from investments than the amount of the profits of his business for the year, was not raised.

Finlay, Q.C., in reply. "Interest" in schedule D to s. 2 of 16 & 17 Vict. c. 34 cannot refer to interest arising from investments made for the purposes of carrying on a business. Otherwise every merchant is liable to pay income tax, both on the interest which he receives for discounting bills, and also on the general profits of his business. In other words he is liable to pay income tax twice over.

Cur. adv. vult.

CHARLES, J. [The learned judge stated the facts as above and proceeded:—] It was contended for the appellants that the case of *Last* v. *London Assurance Corporation* (2) has decided that where any insurance society has paid in taxed interest on invest-

(1) 3 H. & N. 769; 28 L. J. (N.S.) (Ex.) 100.

(2) 12 Q. B. D. 389; 14 Q. B. D. 239; 10 App. Cas. 438.

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ments a sum exceeding what they would have to pay on their net balance of profits, they can be called upon to pay no more; and, after an examination of that case, it appears to us that this contention is well-founded to this extent, but to this extent only, that it was there assumed that the corporation were entitled to credit for income tax paid at the source on interest on investments, and (1) in the form of return after the final judgment in

(1) The following document formed part of the case stated:—

INCOME TAX ASSESSMENT.

(A)

RETURN of LONDON ASSURANCE CORPORATION, as adjudicated upon by the Income Tax Commissioners for the City of London, which formed the foundation of the case of LAST *v.* LONDON ASSURANCE CORPORATION.

GROSS PROFITS—			
MARINE	£27,635	11	9
FIRE	75,766	19	5
LIFE*	27,454	9	5
	£130,857	0	7
Deduct Expenses	57,597	10	0
	£73,259	10	7
Income Tax paid at source on Interest on Investments amounting to	£84,154	15	10
Income Tax over-paid on	£10,895	5	3

* Shareholders' proportion only.

(B)

FORM OF RETURN after final Judgment of House of Lords, as agreed upon between Mr. LAST (on behalf of the Board of Inland Revenue) and the LONDON ASSURANCE CORPORATION.

YEAR .....

MARINE PROFITS, viz., Premiums, less losses, Commission and Bad Debts .. ..£

FIRE do. do. do. ..£

the House of Lords agreed upon between the Board of Inland Revenue and the corporation, the corporation are credited with

LIFE* do. viz.:—			
Surplus at Quinquennial Valuation on 31st Dec., 1880 .. .. ..£			
Less Balance undivided at previous Quinquennium .. .. ..£			
1/5th £			
	£		
Interest, all, except on Life Funds .. ..£			
Profit on Realization of Securities (except on Life Account included in Surplus) ..£			
		£	
Deduct Expenses of the Year		£	
Net Profit		£	
Taxed Interest		£	
Amount remaining to be Assessed, or Amount on which the Tax has been over-paid, as the case may be		£	

* All Life Profits.

(C)

CORRESPONDING RETURN OF CLERICAL, MEDICAL AND GENERAL LIFE ASSURANCE SOCIETY on basis of (B).

YEAR 1885-6.

MARINE PROFITS		*nil.*	
FIRE Do.		*nil.*	
LIFE* Do. viz.:—			
Surplus at Quinquennial Valuation as at June 30th, 1881	£366,693 19 5		
Less Balance undivided at previous Quinquennium	7,940 16 4		
1/5th	£358,753 3 1	£71,750 12 7	
Interest, all, except on Life Funds		£2,500 0 0	
Profit on Realization of Securities (except on Life Account included in Surplus)..		*nil.*	
			£74,250 12 7

* All Life Profits.

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taxed interest accordingly. Although, however, the account was adjusted on this basis, the case did not expressly decide the point now raised, which is, whether where interest on the investments of a life insurance society has not been taxed at its source but paid in full, the Crown is entitled to charge income tax upon it, although the taxed interest paid at its source exceeds the sum which would be payable on trade profits, and we therefore proceed to consider the question apart from the authority of that case.

Now the schedules of charge are at present to be found in 16 & 17 Vict. c. 34, s. 2, which imposes the duty upon the various properties therein mentioned in the schedules. Schedule C is as follows: "For and in respect of all profits arising from interest, annuities, dividends, and shares of annuities, payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue." This schedule, it will be seen, is limited to profits arising from interest, &c., payable out of any public revenue. Schedule D runs thus: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, And for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, And for and in respect of all interest of money, annuities, and other annual

Brought forward	£74,250 12 7
Deduct Expenses of the Year: as the above is *net* Profit the deduction is	*nil.*
Net Profit	£ 74,250 12 7
Taxed Interest	107,378 13 8
Amount on which the Tax has been over-paid	£33,128 1 1

profits and gains not charged by virtue of any of the other schedules contained in this Act."

It will be seen that there are three distinct heads mentioned, the third of which is general in its terms, and applies to all interest of money which, like an annuity, is, in our opinion, primâ facie a profit or gain, and is made specifically a subject matter of charge. The rules according to which the duties contained in Schedule D are to be charged are contained in the earlier Income Tax Act, 5 & 6 Vict. c. 35, s. 102, and the last-mentioned section provides for the deduction of the tax on interest or other annual payment by the persons liable to pay it, and for the allowance of such deduction by the person entitled to receive it, and further enacts as follows.—"In every case where any annual payment as aforesaid shall, by reason of the same being charged on any property or security in the British plantations, or in any other of Her Majesty's dominions, or on any foreign property or foreign security, or otherwise, be received or receivable without such deductions as aforesaid . . . . then and in every such case there shall be charged upon such interest, &c., the duty before mentioned." We agree in the argument addressed to us, an argument which was supported by the authority of *Foley* v. *Fletcher* (1), that this section is not itself a charging section. It is, however, among the rules which regulate the levy of duties under s. 2 of the later Act, 16 & 17 Vict. c. 34, which undoubtedly is a charging section, and specifically charges interest of money invested. If deducted at its source, it cannot be reclaimed except only in the case provided for by 5 & 6 Vict. c. 35, s. 163, which exempts persons whose incomes are less than 150*l.* a year from liability, a circumstance which seems to us to indicate the intention to tax interest on money in all cases as being in itself a profit or gain. In the present instance it has not been deducted, and according to the language of the latter part of s. 102 is taxable in the hands of the recipient. The society contend that, where the interest arises from an investment necessary to conduct their business, it is only taxable as a part of the trade profit, and that, if there is no profit, it should escape taxation altogether, or that, if there be a profit less than the amount invested, the Crown should return

(1) 3 H. & N. 769; 28 L. J. (N.S.) (Ex.) 100.

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the difference between the amount paid on interest and that which will have to be paid on the trade profit. The language of the Act, however, makes no distinction between the case of investments necessary to carry on the business and other investments. The words of the charging section and of s. 102 appear to us expressly applicable to this case, and we are therefore of opinion that the Commissioners are right, and that our judgment must be for the respondent with costs.

MANISTY, J. I concur in the judgment of my learned Brother. I think some difficulty has arisen in the case owing to a confusion between "interest" and "profits." They are distinct things. An income may be derived from interest on investments. An income may also be derived from the profits of a business. The effect of schedules C and D of 16 & 17 Vict. c. 34, s. 2, is specifically to charge with income tax income arising from interest on investments. In this case, owing to the peculiar nature of their business, an insurance company has large "investments" in different securities. On the bulk of the interest from such investments, amounting in one year to 107,378*l.*, income tax has been paid by deduction at the source before this sum was paid to the insurance company, but by accident on a small sum of 165*l.*, equally arising from interest on investments, income tax has not been paid by deduction at the source. If income-tax is payable on the larger sum, why is it not payable on the smaller? Both equally consist of interest, but in one case the tax had, in the other case the tax had not, been paid when the interest became part of the income of the company arising from interest under s. 2 of 16 & 17 Vict. c. 34. The manner in which the annual profits of the company should be computed for purposes of income tax is a different question, and one with which we are not concerned. They are clearly, in my opinion, liable to pay income tax on this small sum arising from interest on investments.

Judgment for respondent.

Solicitor for appellants: *Montagu Turner.*
Solicitor for respondent: *Solicitor to the Inland Revenue.*

H. D. W

IN RE SUNDERLAND 32ND UNIVERSAL BUILDING SOCIETY. 1888 *April* 19.

Building Society—Company—Winding-up Order—Voluntary Winding-up—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 101, 138, 165—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131).

A building society established under the Building Societies Act, 1874, may be wound up voluntarily under the Companies Acts, 1862 and 1867.

In such a winding-up a claim for the repayment of money lent to the defendant out of the funds of the society contrary to its rules may be made by summons.

APPEAL from an order of the Sunderland County Court made in the winding-up of the Sunderland 32nd Universal Building Society on the hearing of a summons issued on behalf of the liquidators. The order was to the effect that an advance of 1000*l.* made to one Jackson out of the funds of the society had been made ultra vires under its rules, and that Jackson was liable to repay the amount to the liquidators. It was objected in the county court that the winding-up order was itself invalid, and that there was, therefore, no jurisdiction to make the order, and that the liquidators were not entitled to proceed against the appellant by way of summons. The order for the winding-up was made in pursuance of a petition for winding-up voluntarily under the supervision of the Court, and was in accordance with Form 4 in Schedule 3, General Order and Rules to regulate the mode of proceeding under the Companies Act, 1862, issued in November, 1872. (1) The making of the order had not been objected to by the appellant.

Haldane, (*J. Lawson Walton*, with him), for the appellant in support of the preliminary objections. A society established under the Building Societies Act, 1874 (1), cannot be wound up

(1) By the Building Societies Act 1874 (37 & 38 Vict. c. 42), s. 32: "A society under this Act may terminate or be dissolved:—

1. Upon the happening of any event declared by its rules to be the termination of the society.
2. By dissolution in manner prescribed by its rules.
3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their

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under the Companies Acts. The Building Societies Act, 1874, does not incorporate the Companies Acts. A supervision order, which the order made purports to be, cannot be made under s. 32. In Buckley on the Companies Acts, 5th Ed. p. 215, it is stated with reference to sub-s. 4 of that section "upon the wording of the clause it would seem that the words 'voluntarily under the supervision of the Court' cannot be read disjunctively, and yet, if they are not, there does not appear to be any power for such a society to wind up voluntarily in the sense in which that term is used in the Companies Acts, and if that be so, a supervision

signatures to the instrument of dissolution. The instrument of dissolution shall set forth—

(*a.*) The liabilities and assets of the society in detail;

(*b.*) The number of members, and the amount standing to their credit in the books of the society;

(*c.*) The claims of depositors and other creditors, and the provision to be made for their payment;

(*d.*) The intended appropriation or division of the funds and property of the society;

(*e.*) The names of one or more persons to be appointed trustees for the special purpose and their remuneration.

Alterations in the instrument of dissolution may be made by the like consent, testified in the same manner. The instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of rules and shall be binding upon all the members of the society.

4. By winding-up, either voluntarily under the supervision of the Court or by the Court, if the Court shall so order, on the petition of any member authorized by three-fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society, or on the petition of any judgment creditor for not less than fifty pounds, but not otherwise. General orders for regulating the proceedings of the Court under this section may be from time to time made by the authority for the time being empowered to make general orders for the Court.

Notice of the commencement and termination of every dissolution or winding-up shall be sent to the registrar and registered by him."

Form 4, Schedule 3, General Order, November, 1862, [General Order and Rules of the High Court of Chancery to regulate the mode of proceeding under the Companies Act, 1862] "In the matter, &c., the Court doth order that the voluntary winding-up of the said —— company be continued, but subject to the supervision of the Court; and any of the proceedings under the said voluntary winding-up may be adopted as the judge shall think fit. And the creditors, contributories, and liquidators of the said company and all other persons interested, are to be at liberty to apply to the judge at chambers as there may be occasion."

order, which is an order to continue a voluntary winding-up, is impossible." Even if the Companies Acts apply, there is nothing to shew that the appellant is "settled on the list of contributories" under s. 101, or guilty of misapplication of funds under s. 165 of the Companies Act, 1862, the only sections which could give jurisdiction. Moreover the Acts nowhere provide that such a proceeding shall be taken by summons. The remedy of the liquidators, if any, is by action.

[He cited *Plumstead Water Company* v. *Davis*. (1)]

Seward Brice, Q.C. (*Eve*, with him), for the respondents. In an application in the winding-up the validity of the winding-up order cannot be disputed. Sect. 32 of the Building Societies Act, 1874, clearly contemplates winding-up under the Companies Acts. Sect. 138 of the Companies Act, 1862, gives the liquidators power to make this application. The ordinary mode of making such an application is by summons.

[He cited the judgment of Jessel, M.R., in *In re Arthur Average Association*. (2)]

THE COURT (Field and Wills, JJ.) held that the winding-up order had been properly made and the summons properly issued.

Objections overruled.

Solicitors for appellant: *H. C. Coote & Ball, for Simey, Sunderland.*

Solicitors for respondents: *Hickin & Fox, for G. S. Lawson, Sunderland.*

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(1) 28 Beav. 545.

(2) Law Rep. 10 Ch. 542, at p. 545.

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July 24.

[IN THE COURT OF APPEAL.]

MORTGAGE INSURANCE CORPORATION, LIMITED, APPELLANTS; COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp Duty—Promissory Note—Agreement—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 49.

In order that a document may be a promissory note within s. 49 of the Stamp Act, 1870, it must substantially contain a promise to pay a definite sum of money and nothing more. A document containing a promise to pay money as part of a contract containing other stipulations would not be a promissory note within the Act.

By an instrument, described as a policy of insurance, after reciting that E. was desirous of being insured with the appellant corporation, and that there had been paid to the corporation the sum of 9*l.* 17*s.* 4*d.*, being the agreed premium for such assurance, it was witnessed that the corporation did thereby guarantee to the assured payment of the sum of 100*l.* on May 18, 1967; provided that, if the assured should be desirous at any time of surrendering the policy, the corporation would allow to him the surrender value thereof as on May 18 last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders:—

Held, affirming the judgment of the Queen's Bench Division, that this instrument was liable to stamp duty as an agreement, and not as a promissory note within s. 49 of the Stamp Act, 1870.

APPEAL from the judgment of the Queen's Bench Division on a case stated by the Commissioners of Inland Revenue under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 19 (reported 20 Q. B. D. 645).

On June 7, 1887, the appellants' solicitors presented, under the provisions of s. 18 of the Stamp Act, 1870, an unstamped instrument to the Commissioners of Inland Revenue for their opinion as to the liability thereof to stamp duty. The instrument (omitting immaterial parts) was as follows:—

"The Mortgage Insurance Corporation, Limited.

"Amount insured 100*l.*

"This policy of assurance witnesseth that whereas W. Elkin, Esq. (who with his executors, administrators, and assigns are hereinafter called the assured) is desirous of being insured by the corporation as hereinafter appearing, and there has been paid to the corporation the sum of 9*l.* 17*s.* 4*d.*, being the agreed premium

for such assurance; Now these presents witness that the corporation do hereby guarantee to the assured payment of the sum of 100*l.* on the 18th day of May, 1967: Provided that, if the assured shall be desirous at any time of surrendering this policy, the corporation will allow to the assured the surrender value thereof as on the 18th day of May last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders."

The commissioners, being of opinion that the instrument was chargeable with stamp duty as a promissory note for 100*l.* assessed the duty thereon at the sum of one shilling, and the instrument was stamped in conformity with that assessment.

The appellants, being dissatisfied with such assessment, required the commissioners to state and sign this case for the opinion of the Court.

The Divisional Court held that the instrument required to be stamped as an agreement and not as a promissory note, and reversed the decision of the commissioners. (1)

The commissioners, the respondents below, appealed.

Sir Edward Clarke, S.G., and *A. V. Dicey*, (*Sir Richard E. Webster, A.G.*, with them), for the commissioners. Sect. 3 of the Stamp Act, 1870, imposes the duties specified in the schedule. By the schedule an agreement or memorandum of an agreement, "not otherwise specifically charged with any duty," is liable to a duty of 6*d.* This instrument is "otherwise specifically charged" as a promissory note within s. 49. (2)

There is in this instrument, first, a promise to pay a definite sum of money on a named day; and, secondly, a promise to pay a smaller sum at an earlier date at the option of the assured. A note may contain a promise to pay two or more sums of money.

(1) 20 Q. B. D. 645.

(2) 33 & 34 Vict. c. 97, s. 49 (1): "The term 'promissory note' means and includes any document or writing (except a bank note) containing a promise to pay any sum of money." (2) "A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a promissory note for the said sum of money."

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This is not a promissory note in the commercial sense, but it comes within the provisions of s. 49. The additional promise by the corporation that the assured may have a smaller sum at any earlier date does not alter the character of the instrument. The instrument is not an agreement because the promisee does not bind himself to do anything. The word "agreement" is intended to be a general expression for the purpose of sweeping in everything that is not otherwise specifically charged. It is not necessary to contend that s. 49 includes all agreements containing a promise to pay a sum of money; but this instrument is in its substance a promissory note as there defined. The definition of a promissory note in s. 49 of the Stamp Act, 1870, is wider than the definition given in the Stamp Act, 1815 (55 Geo. 3, c. 184, Sched., Part I.), certain exemptions specified in the earlier Act being omitted in the later. In *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1), the instrument was called a "debenture," and was held liable to duty as a debenture, because it claimed to stand among a certain class of instruments to which the Act affixed a certain duty. If it had not been called a debenture, it would appear that the Court would have held it to be liable to duty as a promissory note. There the question was between two specific descriptions, "debenture" and "promissory note." In this case it is not. [They also cited *Yeo* v. *Dawe*. (2)]

Sir H. James, Q.C., (*Moulton, Q.C.*, and *Reginald Brown*, with him), for the corporation. Sect. 49 means that the document must consist substantially of a promise to pay a definite sum of money. If the document contains something more than that, it is not a promissory note within s. 49, but is an agreement. This instrument, no doubt, contains a promise to pay a definite sum in 1967, but it also contains a promise to pay the surrender value, which is an unascertained sum, at any date if the assured exercises his option to surrender the policy. The surrender value may vary according to the current tables kept at the time by the corporation. The corporation might not keep tables, and then the action would be for breach of their implied agreement to keep tables, or to compel them to keep tables. The instrument provides for

(1) 7 Q. B. D. 165. (2) 33 W. R. 739; 53 L. T. Rep. (N.S.) 125.

something being done by both parties, and is an agreement. The tests applied in *Yeo* v. *Dawe* (1) were whether the document was intended to be given and accepted as a promissory note, and was in fact one in the mercantile sense. This instrument is clearly not intended to be a promissory note, and was not one in the mercantile sense of the term.

[He also referred to *Crouch* v. *Crédit Foncier of England.* (2)]

Sir Edward Clarke, S.G., replied.

LORD ESHER, M.R. I should be sorry if it were supposed that we are interfering with any of the cases cited to us. But I may be allowed to say that what I am reported to have said in *Yeo* v. *Dawe* (1) as to the parties not intending the document to be a promissory note, meant nothing more than that the intention of the parties is an element to be taken into account in considering what is the nature of the document. I should also be sorry to derogate in any way from the reasoning in *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue.* (3) I do not think that either of those cases govern the present case. In my opinion this document is not a promissory note at all within s. 49, and I think that the only way in which it can be brought within the Stamp Act is under the term "agreement." I do not think it comes within s. 49 for this reason. Sub-s. 1 defines a promissory note as a document or writing (except a bank-note) containing a promise to pay any sum of money. To constitute the document a promissory note within that sub-section there must be a promise to pay a defined sum of money, and a defined sum of money only. By sub-s. 2 a note promising the payment of any sum of money out of a particular fund or upon a contingency is to be deemed a promissory note for "the said sum of money." There again it must be a defined sum of money, though under that sub-section the sum may be payable out of a particular fund or upon a contingency. But where, though the document contains a promise to pay a defined sum of money, it also contains certain stipulations under which instead of the promisor paying that defined sum there will be an

(1) 33 W. R. 739; 53 L. T. Rep. (N.S.) 125. (2) Law Rep. 8 Q. B. 374.
(3) 7 Q. B. D. 165.

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Lord Esher, M.R.

undefined sum to be paid, in my opinion that document is not a promissory note within s. 49. Such a document is not a promissory note in the ordinary mercantile sense of the term, and the observations of Blackburn, J., in *Crouch* v. *Crédit Foncier of England* (1) are strong to shew that the document in the present case could not be treated as a negotiable instrument, that is, as a mercantile promissory note. For these reasons this document is not, in my opinion, a promissory note within the meaning of s. 49, and the judgment of the Divisional Court must be affirmed.

LINDLEY, L.J. I am of the same opinion. In looking at s. 49, the first thing that strikes one is that it is one of a group of sections headed "Bank Notes, Bills of Exchange, and Promissory Notes." The very fact of all those documents being generically described in the way I have mentioned shews that the legislature must have intended to refer, primâ facie at all events, to such documents as come within that description. It is obvious, however, if one looks at the language of the section, that certain documents which are not negotiable instruments have to be stamped as bills of exchange or promissory notes, and more particularly when one refers to s. 49, sub-s. 2, under which a note promising the payment of a sum of money out of a particular fund or upon a condition or contingency is to be deemed for the purposes of the Act a promissory note for the said sum of money. Such a document as is there referred to would not be negotiable as a promissory note. The mere fact that there was a condition would destroy its negotiability, and yet it must be stamped as one. What, then, is the meaning of the words in sub-s. 1, "any document containing a promise to pay any sum of money"? It has been pointed out by every one who has had to construe the section that those words cannot receive a literal meaning, for, if they did, all sorts of documents as to which it would be absurd to suppose that they would be treated for any purpose as promissory notes, such as bonds, mortgages, &c., which contain a promise to pay, would have to be stamped as promissory notes. To make the section intelligible some rational limitation must

(1) Law Rep. 8 Q. B. 374.

be placed upon the words, but the difficulty is to know what limitation. The section speaks of a document containing a promise to pay a sum of money. In my opinion that means a definite sum of money, not a fluctuating or unascertained sum; and I also think that "containing a promise to pay" must mean that that is the substance of the document, the whole contents; it cannot mean containing a promise to pay forming one of a number of stipulations. If the instrument is not merely a promise to pay but contains a promise to pay in connection with a number of other stipulations, then I think it is not a promissory note within the meaning of the section. Unless some restriction of that kind is placed upon the words of s. 49, they would include every document containing a promise to pay. When one looks at this document, it becomes apparent that, although it contains a promise to pay the sum of 100*l.* at a definite date, it also contains a great deal more. It imposes upon the corporation which has to make that payment the duty of paying an unascertained sum upon other conditions. Upon the request of the assured, whenever he may wish it, the corporation is to pay him an unascertained sum of money, and that sum would have to be ascertained from the tables which it is the implied duty of the corporation to keep. This document therefore contains more than a promise to pay, and does not come within the section.

BOWEN, L.J. I am of the same opinion. The question is whether the document before us is a promissory note within the meaning of s. 49 of the Stamp Act, 1870. It is clear that it is not a promissory note at common law, but we must go further and consider whether it comes within the special definition or interpretation placed upon that term by s. 49. Now the first clause of s. 49 provides that "the term 'promissory note' means and includes any document or writing (except a bank note) containing a promise to pay any sum of money." Most commercial documents contain, either expressly or by implication, a promise to pay a sum of money, but they may contain a great deal besides, and it cannot be contended that all such documents are promissory notes within the meaning of the section. It

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Bowen, L.J.

would sweep into the term, "promissory note," documents which are as unlike promissory notes as can be, and which contain none of the elements of promissory notes properly understood. Some limitation must be found for the words. In my opinion the true interpretation is that they are meant to include documents the contents of which consist substantially of a promise to pay a definite sum of money, and of nothing else. If that meaning is placed upon the words the language becomes intelligible and the section is workable. So also with regard to sub-s. 2; though it brings within the term "promissory note" documents, which, by reason of their being framed so as to be enforceable only on a contingency or against a particular fund, would not be promissory notes, still it is a necessary condition of their falling within the section that they should consist of a promise to pay a definite sum of money and of nothing else. I proceed to apply that interpretation of the section to this document. The document cousists of two parts. In the first place there is the promise to pay a definite sum on May 18, 1967; but one sees at once that there must be something in the document besides a promise to pay eighty years afterwards. The truth is that that obligation is intended to secure a further obligation which the document next creates, and that further obligation is that whenever the assured chooses to bring in his policy and surrender it the corporation promise to pay him the surrender value thereof, which being a fluctuating value would have to be ascertained in each case according to the tables which the corporation impliedly undertake to keep. That is the second obligation. The first obligation, which alone is in the nature of a promise to pay, is only intended to secure this second obligation. It cannot be said that the contents of this document consist only of a promise to pay a definite sum of money. It consists of a great deal more, and that being so it seems to me that it is not within the section. I do not think that any of the cases cited conflict with this view of the section.

Appeal dismissed.

Solicitors for the appellants: *Linklater & Co.*

Solicitor for the respondents: *Solicitor of Inland Revenue.*

E. L.

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1888
July 27.

County Court—Practice—Commitment—Form of Order—Prohibition—Debtors Act, 1869 (32 & 33 *Vict.* c. 62), *s.* 5—*County Court Rules,* 1886, *Order* II., *r.* 2, *Order* XXV., *r.* 33.

On the hearing of a judgment summons in a County Court the Judge committed the defendant, but suspended the order. The only written document which had been drawn up was in the books of the County Court, in the form given in the schedule to the County Court Rules, 1886, among the forms of books which, by Order II., r. 2, the registrar is directed to keep, headed "Book H.—Summonses for Commitment, Interpleader, and Minutes of Orders thereon."

The defendant applied for a prohibition on the ground that the order did not shew on its face the ground on which it was issued, as required by s. 5, sub-s. 1 (*a*), of the Debtors Act, 1869:—

Held, that the minute of the order in Book H (which did not shew on its face the ground on which the order was issued) was not the order within the meaning of the Debtors Act, but that, as the order, if it were afterwards drawn up as directed by Order XXV., r. 33, of the County Court Rules, 1886, would sufficiently comply with the Act, the application for a prohibition must be refused.

APPEAL by the defendant from the refusal of Charles, J., at chambers to grant an order for a prohibition to prohibit all proceedings on two orders of commitment made by the Judge of the County Court of Kent holden at Bromley. The plaintiff had obtained two judgments against the defendant in the High Court, and had issued two judgment summonses out of the County Court. At the hearing of the summonses in the County Court the Judge made an order on each summons that the defendant be committed for thirty days, but suspended the order for a month in each case. The only written documents which had been drawn up were in the books of the County Court, in the form given in the schedule to the County Court Rules, 1886, among the forms of books which, by Order II., r. 2, the registrar is directed to keep, headed "Book H.—Summonses for Commitment, Interpleader, and Minutes of Orders thereon."

The defendant in person in support of the appeal. The commitments are bad, for there is no order shewing on its face the ground on which it is issued. (1)

(1) By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5: "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court

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T. Willes Chitty, for the plaintiff. The minutes of the orders in the books of the County Court are a sufficient compliance with s. 5 of the Debtors Act, 1869. If this is not so, there are no orders in writing, but in that case the present application is premature, for the orders are not yet drawn up, and when they are drawn up, if the proper form is used, which is Form 57 in the Schedule to the County Court Rules, 1886, the ground on which the orders are issued will appear on the face of the orders. [He referred to *Stonor* v. *Fowle*. (1)]

The defendant replied.

LORD COLERIDGE, C.J. I am of opinion that this application for a prohibition must be refused, on the ground that the applicant comes too soon. At present there is nothing to prohibit, for the order has not been drawn up, and if we were now to grant an order for a prohibition we should be interfering before it had been shewn that the County Court was likely to act in excess of its jurisdiction. This ground of decision is entirely inconsistent with Mr. Chitty's argument that the note in Book H is the "order" within the meaning of s. 5 of the Debtors Act, 1869. It clearly is not so, for the minute of an order is not an order. If the form of order given in the County Court Rules, 1886, (Form 57), is adopted, all the conditions precedent required by the Debtors Act will appear on the face of the order when it is

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may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent court: Provided:—

"(1) That the jurisdiction by this section given of committing a person to prison shall, in the case of any court other than the superior courts of law and equity, be exercised only subject to the following restrictions: that is to say,

(*a*) Be exercised only by a judge or his deputy, and by an order made in open court and shewing on its face the ground on which it is issued."

By the County Court Rules, 1886, Order II., r. 2, the registrar shall keep books in the forms given in the Appendix, among which is Book H. By Order XXV., r. 33: "An order of commitment made under the Debtors Act, 1869, shall be according to the form in the Appendix."

The forms are, Form 55 for an order on the judgment of a county court, and Form 57 for an order on the judgment of any other court, both of which forms shew on the face of the order the ground on which it is issued.

(1) 13 App. Cas. 20.

drawn up. There is a recital in that form as to means, and therefore the fact that the debtor has or has had means will appear on the face of the order. Sect. 5 of the Debtors Act, 1869, contains certain requirements which must be complied with. It requires that the order shall be made by the County Court Judge or his deputy; here it was made by the Judge, who directed that the order should be drawn up and put in force at a later date, thus giving the debtor an opportunity of paying the debt in the meantime. The Act also requires that the order shall be made in open court; here it was so made. The Act further requires that the order shall shew on its face the ground on which it is issued. There is nothing to shew that the direction which the Judge gives in open court must be then and there drawn up in the form of an order. It may be drawn up afterwards, and when it is so drawn up that will be the order, and it will shew on its face the ground on which it is issued, which has already been stated by the Judge in open court, but the minute of the order contained in Book H is not the order. In the same way an order is sometimes made in the High Court, such as an order for a mandamus, the operation of which is suspended, and which is directed not to be drawn up for a certain time. Sect. 5, sub-s. 1 (*a*), of the Debtors Act, 1869, should be read as having the same meaning as if the words were "showing on its face when drawn up the ground on which it is issued." The view we take is entirely in accordance with the decision of the House of Lords in *Stonor* v. *Fowle*. (1) In that case the Divisional Court and the Court of Appeal had not the actual order before them, but only the direction, but the order itself was before the House of Lords, and on this difference of fact the House of Lords corrected the error which had taken place, but they did not say anything less than that the order drawn up as directed by the County Court Rules, 1886, Order XXV., rule 33, is the order within the meaning of the Debtors Act, 1869. That case, therefore, is a direct authority to shew that the order is that which in the present case has not yet been made, and therefore there is nothing to prohibit, for there is nothing to shew that the requirements of the Debtors Act will not be complied with when the order is drawn up.

(1) 13 App. Cas. 20.

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BOWEN, L.J. I am of the same opinion. The applicant asks for our interference on the ground that there is no order which shews on its face the ground on which it is issued. This is true, but the answer is that the time has not yet come for the existence of such an order. When the order is drawn up, if the prescribed form is adhered to, it will shew on its face the ground on which it is issued. I agree with what has been said by the Lord Chief Justice, and I think that this document which is before us is not the order, but is the minute of an order which is to be drawn up hereafter. The provisions of the County Court Rules and the decision of the House of Lords in *Stonor* v. *Fowle* (1) shew that the true interpretation of the Debtors Act is that the order is to be made in open court, and is to be drawn up shewing on its face the ground on which it is issued.

Appeal dismissed.

Solicitor for plaintiff: *George Weller.*

P. B. H.

June 19, 20; *July* 18, 19.

[IN THE COURT OF APPEAL.]

HENDERSON *v.* PRESTON.

Prison—Governor of Prison—Warrant of Commitment—Action against Governor for False Imprisonment—Protection of Warrant—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *ss.* 5, 21, 29—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *s.* 12.

The governor of a prison is protected in obeying a warrant of commitment valid on the face of it, and an action for false imprisonment will not lie against him for the detention of a prisoner in pursuance of the terms of such warrant.

The plaintiff having been convicted by a court of summary jurisdiction and sentenced to seven days imprisonment, a warrant of commitment was issued directing that the plaintiff should be imprisoned in a certain gaol for seven days. The plaintiff was arrested on August 24, and lodged in prison on August 25. The governor of the gaol kept the plaintiff in prison until and during August 31:—

Held, that, whether or not the plaintiff's sentence ran from August 24 or August 25, the governor was protected by the warrant, and was not liable to an action for false imprisonment in respect of the plaintiff's detention on August 31.

POINT of law raised on the pleadings. The action was brought by the plaintiff to recover damages against the defendant, the

(1) 13 App. Cas. 20.

governor of Strangeways Gaol, Manchester, for having illegally kept him in imprisonment on August 31, 1887. It appeared that the plaintiff had been sentenced by a court of summary jurisdiction on August 24 to pay a fine, or in default to seven days imprisonment, and that he was arrested the same day, but was not lodged in prison till August 25. Under these circumstances the plaintiff contended that the imprisonment began on August 24, the date of the arrest.

The defendant, in his defence, pleaded not guilty by statute (Prison Act, 1865 and Prison Act, 1877), and set out the warrant for the commitment of the prisoner. This warrant, which was dated August 24, 1887, was directed to the constables of the county and to the governor of Her Majesty's prison at Strangeways, Manchester, and, after reciting the conviction of the plaintiff for obstructing a highway, the adjudication of a penalty to be paid by him, the non-payment of the penalty and costs and the failure of sufficient distress, ordered that the plaintiff be imprisoned in the prison aforesaid and there kept for the space of seven days unless the penalty and costs were sooner paid, and directed the constables to take and convey him to the prison, and there deliver him to the governor, together with the warrant, and the governor of the prison to receive him into his custody and keep him for the space of seven days, unless, &c. The defence further stated that on August 25, 1887, the defendant, as governor, received the plaintiff into such prison under and with the warrant of commitment; that the penalty and costs were not paid before the expiration of the period named in the warrant, nor on or before August 31, 1887; and that the plaintiff upon such receipt as aforesaid became and was and thenceforth, until and during August 31, 1887, continued in the custody of Her Majesty's Principal Secretary of State by virtue of the Prison Act, 1877.

The plaintiff in his reply objected that the defence was no answer in law to his claim.

P. Gye, for the plaintiff. The imprisonment of the plaintiff on August 31 was illegal. He was arrested in pursuance of the sentence on August 24, and though not committed to gaol till

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the next day, the 25th, was a prisoner and constructively an inmate of the gaol from the 24th. The sentence dates from the conviction, or, if not, from the arrest. The person sentenced becomes a prisoner as soon as he is deprived of his liberty. In Hawkins, P. C., book 2, c. 18, s. 4, it is stated with reference to statute 1 Edw. 2, de frangentibus prisonam: "It seems clear that any place whatsoever wherein a person under a lawful arrest for a supposed crime is restrained of his liberty, whether in the stocks or the street, or in the common gaol, or in the house of a constable or private person, or the prison of the ordinary, is properly a prison within the statute; for imprisonment is nothing else but a restraint of liberty." The question has arisen with respect to the calculation of terms of imprisonment for debt under warrants issued from the Palace Court, and it would seem from *Bowdler's Case* (1) and *Braham* v. *Joyce* (2) that the time is to be computed from the date of the arrest. [He also referred to *Reg.* v. *Cutbush* (3), *Migotti* v. *Colvill* (4), and *In re Fletcher* (5).]

R. S. Wright, for the defendant. The imprisonment dates from the day on which the plaintiff was lodged in gaol under the warrant. *Ex parte Foulkes* (6) expressly decides this point, and has never been questioned. As to *Bowdler's Case* (1), Lord Denman, C.J., in his judgment refers to *Ex parte Foulkes* (6), and the question was not argued either in that case or in *Braham* v. *Joyce* (2). The two cases did not decide that imprisonment for debt was to be calculated from the date of arrest as opposed to that of commitment, but merely that the time for which the debtor succeeded in evading arrest after the issue of the warrant was not to be reckoned as part of his sentence.

P. Gye, in reply. *Bowdler's Case* (1) decides that the imprisonment dates from arrest. Erle, J. (7) states it to be the duty of the gaoler to ascertain the date of the arrest, with a view to detaining the prisoner for the proper period.

MANISTY, J. I am of opinion that the imprisonment of the plaintiff on August 31, 1887, was legal under the statute. The

(1) 12 Q. B. 612.
(2) 4 Ex. 487.
(3) Law. Rep. 2 Q. B. 379; 36 L. J. (M. C.) 70.
(4) 4 C. P. D. 233.
(5) 1 D. & L. 726.
(6) 15 M. & W. 612.
(7) At p. 622.

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language of the warrant is plain. The governor of the gaol is "to receive the defendant into his custody," and is "to keep him for the space of seven days," except in an event which has not happened. This is what the governor has done. Could it be contended that, if a prisoner were arrested at five minutes before twelve at night and committed to prison at five minutes past twelve, his first day's imprisonment would have expired before he was lodged in prison? Common sense is a better guide in such matters than authority. As to the cases, *In re Fletcher* (1) does not appear to me to assist the plaintiff. *Ex parte Foulkes* (2) was decided before *Bowdler's Case* (3), and the judgment of Alderson, B., is directly in the defendant's favour. He says: "As to the duration of the imprisonment, I think it is clear that it begins to run from the day on which the prisoner is actually lodged in gaol." *Bowdler's Case* (3) turns on there being no date to a special form of warrant, and *Braham* v. *Joyce* (4) is an ambiguous decision. Our judgment must be for the defendant.

STEPHEN, J. I am of the same opinion. The warrant is good, and protects the governor. No more need be said. As to the cases, *Ex parte Foulkes* (2) is entirely in the defendant's favour. *In re Fletcher* (1) is doubted in *Bowdler's Case* (3); and neither in *Bowdler's Case* (3) nor in *Braham* v. *Joyce* (4) had the Court before it the question of the effect of an interval occurring between arrest and commitment, as regards the duration of the sentence.

Judgment for the defendant.

H. D. W.

The plaintiff appealed.

1888. July 18, 19. *Percy Gye*, and *Waghorn*, for the plaintiff, argued as in the court below.

R. S. Wright, for the defendant, argued that the gaoler's duty lay within the four corners of the warrant. The warrant followed the Form 27 of the Summary Jurisdiction Rules, 1880, which form, by s. 12 of the Summary Jurisdiction Act, 1884 (47 & 48

(1) 1 D. & L. 726.
(2) 15 M. & W. 612.
(3) 12 Q. B. 612.
(4) 4 Ex. 487.

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Vict. c. 43), has the force of a statute. The defendant, therefore, was protected in obeying the warrant.

The following authorities were cited in addition to those already referred to:—*Olliet* v. *Bessey* (1); *Tarlton* v. *Fisher* (2); *Moone* v. *Rose* (3); *Ames* v. *Waterlow* (4); Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 5, 21, 29.

LORD ESHER, M.R. It is not denied that this warrant is justified by the Act of Parliament, and is not a void warrant. It is not on its face issued by persons who have no jurisdiction to issue a warrant. It is issued by a Court having jurisdiction, and its terms are perfectly clear. It orders the governor of Strangeways gaol to receive the present plaintiff into his custody when he is brought there, and to keep him in that gaol for seven days. That being the warrant, I adopt the judgment of Stephen, J., when he says that the warrant protects the governor, and that no more need be said. In the case of *Olliet* v. *Bessey* (1) decided about 200 years ago, it was so held, and from that day to this no action can be found in the books to have been maintained against a gaoler where he acted within the terms of the warrant. That is sufficient to determine this case. Whether the plaintiff had any and, if so, what remedy, is a matter we need not inquire into: in any case this action will not lie. The appeal must, therefore, be dismissed.

LINDLEY, L.J. I am of the same opinion. All that one has to do is to read the warrant. What is a governor of a gaol who receives such a warrant to do except to obey it? It is perfectly valid and correct, and is authorized by the Act of Parliament, and issued by persons who have jurisdiction to issue it. It appears to me that the governor by obeying that warrant has simply done his duty, and the warrant protects him and is an answer to the action. In the case of *Moone* v. *Rose* (3) the plaintiff was committed for contempt in not answering to a bill in Chancery, and the statute which relates to contempt says that, unless the person be brought to the bar of the Court within thirty days from the time of his being in custody, the gaoler

(1) T. Jones' Rep. 214.
(2) 2 Doug. 671.
(3) Law Rep. 4 Q. B. 486.
(4) Law Rep. 5 C. P. 53.

shall thereupon discharge him out of custody. The gaoler in that case had not performed the duty imposed upon him by the statute, and so the action lay. Then there is the old case of *Olliet* v. *Bessey* (1) and the case of *Butt* v. *Newman* (2), in both of which it was held that the gaoler was protected by the warrant.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff: *Ranger & Burton.*
Solicitor for the defendant: *Solicitor to the Treasury.*

E. L.

[IN THE COURT OF APPEAL.]

July 24.

KELLARD *v.* ROOKE.

Negligence—Master and Servant—Person intrusted with Superintendence—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-ss.* 2, 3; *s.* 8.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. B. was himself a labourer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way:—

Held, that the plaintiff was not entitled to recover, as B. was not a person who had superintendence intrusted to him within s. 1, sub-s. 2, as defined by s. 8, nor was there any evidence that the injury resulted from the plaintiff having conformed to any order of B. within s. 1, sub-s. 3, assuming that B. was a person to whose orders the plaintiff was bound to conform.

Judgment of the Queen's Bench Division (19 Q. B. D. 585) affirmed.

APPEAL from the judgment of the Queen's Bench Division (reported 19 Q. B. D. 585).

The plaintiff brought an action in the Southwark County Court to recover damages under the Employers' Liability Act, 1880. It appeared from the evidence that the plaintiff was

(1) T. Jones' Rep. 214. (2) Gow. 97.

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employed with other workmen by the defendant to assist in stowing bales of wool on board the defendant's steamship *Albatross*, in the St. Katharine's Docks. The workmen were divided into gangs, the foreman of the plaintiff's gang being one Bodfield, and this gang was at work at the forehold. The bales were brought to the hatchway by means of a steam crane, and were then unhooked and thrown down into the hold. Bodfield was at work on deck with some of the gang throwing the bales down, and he used to call out to the men below, "Stand from under," before the bales were thrown down, and the men below used to reply "Come on." While the plaintiff was at work below stowing the bales as they were sent down, he was struck by a bale thrown down by Bodfield. The evidence was to the effect that Bodfield called out, "Stand from under," and some of the men below called out, "Hold them up," but the bale came down almost at the same time. It appeared that the defendant usually superintended the loading of the vessel, but that Bodfield was superintending at the time of the accident during the temporary absence of the defendant. The county court judge nonsuited the plaintiff, and the Divisional Court upheld the nonsuit on the ground that there was no evidence that Bodfield was "a person who had superintendence intrusted to him" within s. 1, sub-s. 2, as defined by s. 8 (1) of the Employers' Liability Act, 1880, or that the injury was caused by any order of Bodfield, even assuming that Bodfield was a person to whose orders the plaintiff was bound to conform within s. 1, sub-s. 3.

The plaintiff appealed.

Wedderburn, and *C. G. Ellis*, for the plaintiff. There was evidence that Bodfield's principal duty was that of superintending the gang in which the plaintiff was working, and that he was guilty of negligence while intrusted with that superintendence which resulted in the injury to the plaintiff. Though Bodfield may have been engaged in manual labour, the injury occurred

(1) 43 & 44 Vict. c. 42, s. 8: "The expression 'person who has superintendence intrusted to him,' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

from his negligence while he was engaged in superintendence within s. 1, sub-s. 2, of the Employers' Liability Act, 1880. They cited on this point *Wright* v. *Wallis* (1), and *Shaffers* v. *General Steam Navigation Co.* (2) Secondly, it is submitted that the case comes within s. 1, sub-s. 3, as the plaintiff was working under Bodfield's orders, and the injury was caused while the plaintiff was obeying his orders. It is similar to the case of *Millward* v. *Midland Ry. Co.* (3)

Tatlock, for the defendant, was not called upon.

LORD ESHER, M.R. I cannot see that this case is at all the same as *Wright* v. *Wallis*. (1) The first question raised is, whether there was any evidence that would bring the case within s. 1, sub-s. 2, of the Employers' Liability Act, 1880. I do not think there was any evidence that Bodfield was a person who had superintendence intrusted to him, that is to say, as defined by s. 8, that he was a person whose sole or principal duty was that of superintendence, and who was not ordinarily engaged in manual labour. The evidence was conclusive to the effect that Bodfield was only temporarily superintending the work during the absence of the defendant, and that he was ordinarily engaged in manual labour, and was engaged on this very day working with his hands. Bodfield, therefore, was not a person having superintendence intrusted to him within the meaning of sub-s. 2 of s. 1 as defined by s. 8. It was then said that there was evidence that Bodfield was a person to whose orders or directions the plaintiff was bound to conform, and did conform, and that the injury resulted from his having so conformed, within sub-s. 3 of s. 1. In my opinion the case cannot be brought within that sub-section, because, even assuming that the plaintiff was bound to obey the directions of Bodfield, there was no evidence that Bodfield gave any order which caused the injury to the plaintiff. Bodfield did not order the plaintiff to stand under the hatchway while the bale was being lowered. On the contrary, the evidence shewed that the order was to stand away. It was suggested that an order must be implied from the circumstances.

(1) 3 Times L. R. 779. (2) 10 Q. B. D. 356.
(3) 14 Q. B. D. 68.

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Such an order can only be implied from the ordinary course of business. There was no course of business here from which any order which caused the accident could be implied. There was, then, no order either express or implied to the plaintiff which caused the injury, and the sub-section is not applicable. The nonsuit therefore was right, and the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The case is really exhausted by the judgment of A. L. Smith, J., in the Divisional Court, who has dealt carefully and elaborately with all the points raised. When once we see what Bodfield's position was, no one could possibly come to the conclusion that he was a person whose principal duty was superintendence, and who was not ordinarily engaged in manual labour, within the definition given in s. 8. It is quite clear that he was ordinarily engaged in manual labour though he may have had some superintendence intrusted to him. The case, therefore, is not brought within sub-s. 2 of s. 1. With respect to sub-s. 3 of s. 1, there is no case at all. This point was not raised before the county court judge, but even if it had been there was no evidence which he could have left to the jury upon this point. As to *Wright* v. *Wallis* (1), that case turned upon this, that there was no sufficient evidence to shew what was the real position of the man Thomas, and the Court had not the materials to decide it, and sent the case down for further investigation. That case turned upon the facts, and laid down no proposition of law.

BOWEN, L.J. I am of the same opinion, and will only add that the case is perfectly clear.

Appeal dismissed.

Solicitor for plaintiff: *R. Chapman.*

Solicitors for defendant; *Watson, Sons, & Room.*

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(1) 3 Times L. R. 779.

[IN THE COURT OF APPEAL.]

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July 2, 19.

WALSH *v.* WHITELEY AND ANOTHER.

Negligence—Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1, *s.* 2, *sub-s.* 1—*Defect in Condition of Machinery —Dangerous Machine.*

The mere fact that a machine is dangerous to a workman employed to work with it does not shew that there is a defect in the condition of the machine within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1, inasmuch as by s. 2, sub-s. 1, of the Act the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service intrusted by him with the duty of seeing that the machine is in proper condition.

The plaintiff in an action under the Employers' Liability Act, 1880, was employed by the defendants to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which while in motion the plaintiff had to place a band. The disc of the wheel had holes in it, and, while the plaintiff was putting on the band, his thumb slipped through one of these holes, the result being that it was caught between the wheel and the bed-plate of the machine and cut off. It was proved that, though these wheels were sometimes made without such holes, they were very commonly made with them, the object being to reduce the weight of the wheel and consequent friction. In the defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously arisen with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine because it had never entered into his head that it was dangerous:—

Held, by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting, that there was no evidence of any defect in the machine implying negligence in the defendants or any one in their service, and therefore that the defendants were not liable.

APPEAL from the judgment of the Queen's Bench Division on an appeal from the County Court of Blackburn.

The action was brought by the plaintiff to recover compensation for personal injuries under the Employers' Liability Act, the facts, so far as material, being as follows:—

The plaintiff was employed in the defendants' mill at Blackburn as a grinder at a carding machine. Part of the machine consisted of a vertical wheel or pulley revolving upon a pin fixed in an horizontal bed-plate. Upon this wheel while in motion the plaintiff had to place a band. The disc of the wheel was not solid throughout, but had a number of holes in it. While the

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plaintiff was putting the band on to the wheel while in motion, his thumb slipped through one of these holes and in consequence was caught between the wheel and the bed-plate and cut off.

It appeared from the evidence on both sides that these wheels or pulleys were sometimes made with and sometimes without holes. The plaintiff's witnesses stated generally that in their opinion the wheels with holes were dangerous, and that the holes were of no use; but the plaintiff admitted that there had during his experience of thirteen years as a grinder always been wheels with holes in use, though not so close to the bed-plate as in the machine in question, and that he had never complained of the machine, because it never entered into his head that it was dangerous.

The result of the evidence adduced on behalf of the defendants was that the machine in question, which had been in use ten years, was made by good makers, that their practice was to make such wheels with holes, and that it was very usual to have the wheels so made, the object being to diminish the weight of the wheel and so lessen the friction. It appeared that there were wheels of both sorts in use in the defendants' mill, and their card-master, who was called, stated that he had never heard any complaint of the open wheels.

The county court judge left it to the jury to say whether there was a defect in the condition of the machine, telling them that to be defective it must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found for the plaintiff with 30*l.* damages, and the county court judge gave judgment accordingly.

On appeal to the Queen's Bench Division, the Divisional Court (Wills and Grantham, JJ.) were divided in opinion, Wills, J., thinking that there was evidence to go to the jury that the machine was defective, Grantham, J., thinking that there was not. The appeal was therefore dismissed.

Wheeler, Q.C., and *E. Bray*, for the defendants. There was no evidence of any defect in this machine for which the defendants were responsible under the Act. The 1st sub-section of the 1st section of the Act must be read in conjunction with the 1st sub-

section of the 2nd section. It is only defects which arise from or are not discovered or remedied owing to the negligence of the employer, or some person in his service, for which the employer is liable. There was no evidence in this case of anything amounting to negligence by the employer or any of his servants. The whole foundation of liability under the statute is negligence. The object of the statute was to remove the disability peculiar to the servant which arose from the doctrines of common employment, and that he impliedly undertook the risks of the service. It was never intended to alter the law in his favour to any greater extent. The mere fact that the machine is dangerous to the knowledge of the employer is not evidence of negligence. A machine may be dangerous to some extent, and yet may be the best known form of machine. It could hardly be said in that case that there was negligence on the part of the employer. A certain amount of risk may be incidental to the employment. This machine was constructed in a manner very commonly adopted in the construction of such machines; and there was nothing to shew that any complaints had ever arisen with regard to machines so constructed. It is not negligence on the part of employers of labour not to adopt the very latest improvements and the most absolutely safe modes of construction.

T. Willes Chitty, for the plaintiff. There was evidence for the jury that the machine was defective. Anything in the construction of the machine which renders it unnecessarily dangerous to the workman in using it for the purpose for which it was intended to be used is a defect. It is clear that either the wheel could have been made without these holes or that it might have been placed further from the bedplate, in either of which cases such an accident as this could not have happened. If there was any evidence to support the finding, it is sufficient; it is immaterial that this Court might not have come to the same conclusion of fact.

Bray, in reply.

The following cases were cited during the argument in addition to those referred to in the judgment: *Paley* v. *Garnett* (1); *Crafter* v. *Metropolitan Ry. Co.* (2)

Cur. adv. vult.

(1) 16 Q. B. D. 52.

(2) Law Rep. 1 C. P. 300.

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1888. July 19. The following judgments were delivered :—

LORD ESHER, M.R. In this case the action was brought by a workman against his master under s. 1, sub-s. 1, of the Employers' Liability Act, 1880, and was tried in the Blackburn County Court with a jury. The jury in effect found that the injury was caused by reason of a defect in the condition of the machine which the plaintiff was using, and that such defect arose from the negligence of the defendants either in not having discovered or in not having remedied the defect. On these findings the county court judge gave judgment for the plaintiff. The case was brought on appeal to the Divisional Court, where there was a division of opinion, and the case, therefore, comes before us. There are one or two preliminary observations which I wish to make before proceeding to deal with the facts of the case. There have always been, I think, two schools of thought in relation to cases of this kind, that is to say, cases of injury happening to workmen while in the employment of their masters. The view of one school has been that, in order to prevent injustice to masters, the construction of these enactments relating to masters and workmen should be narrowed, and that they should be construed as strictly as possible. The view of the other school is that masters and workmen are not really on an equal footing : that, if there is danger in the employment, it does not exist with regard to the master, but only in the case of the workman : and the workman is not on an equal footing, because he must run the risk or give up his employment. These two schools of thought may easily be traced in the cases on the subject of masters and workmen. When the subject was investigated before a committee of the House of Commons before the Act was passed, conflicting views were presented to the committee, one being that the then existing law of master and servant with regard to the liabilities of the master was a just and right law, the other being that the law on that subject had been laid down by the judges on wrong principles, and was unfair to the workmen, and that it ought to be altered : and it was upon these conflicting views that this legislation took place. The title of the Employers' Liability Act, 1880, itself indicates that it was passed in favour of the workman. Its object clearly was to alter the law in favour of the workman and to extend the liabilities

of masters. Since the passing of the statute it appears to me that the same conflict of views which existed previously has still been in operation. Some judges have construed the Act as narrowly as possible with a view to preventing what they conceived to be injustice to masters. Other judges have considered that the Act, having been passed to extend the liabilities of masters in favour of workmen, ought to be construed liberally in favour of the workman. I myself have always belonged to the latter school. I think that those who belonged to the former school have approached the enactment with too much timidity, and on the other hand have been too bold in interfering with the verdicts of juries. I must say I thought it was well settled by the House of Lords that the verdicts of juries ought not to be interfered with except upon the strongest grounds.

Having made these preliminary observations I proceed to deal with this case. Two questions appear to me to arise for our decision. First, how far ought the Court to interfere with the verdict of the jury? Secondly, what is the true construction of the statute? With respect to the first question the jury must be taken in this case to have found that the machine was defective in this sense, viz., that it was dangerous to workmen using it in the way in which this plaintiff was using it. We are asked to say that that verdict is wrong, because there was no evidence that the machine was defective or that it was defective by reason of the negligence of the employers. It was contended during the argument that there could not be negligence on the part of the employer, where the machine in question was of the best known form of the particular kind of machine which existed at the time. Assuming that to be so here, this contention seems to me to be erroneous. The same view was put forward with regard to locomotive engines on railways, in the case of which it was said that there was no negligence in using engines that emitted sparks, because there were no better engines known. That view was held to be wrong, the true test being not whether the engine was the best form of engine known at the time, but whether a careful man would have seen that it was an engine which would emit sparks. If so there would be negligence on the part of the owner. So here, if there was a defect in the machine, so as to make it

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dangerous to workmen using it, it would be no answer to say that, though the master used a machine that was dangerous to his workmen, no one up to that time had invented a better one, and that it was the best machine theretofore manufactured. The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would shew it to be dangerous to the workman using it. I am prepared to say that, if a careful consideration would shew a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workman, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman, if he is thereby injured. The case would be still stronger, if on a careful consideration by the master or by skilled persons an improvement could be made and had not been made; there would then be still stronger evidence to shew that there was negligence on the part of the master in using the machine. In the present case the machine had been in use for several years, and it appeared that there had been another form of machine brought into use which was without holes. The jury thereupon had to consider whether the machine was defective in the sense of being dangerous to the workman using it, and, if it was so defective, whether or not the master by the exercise of ordinary care would have known it to be dangerous. That was a question for the jury. They have by their verdict said that the machine was dangerous to the workman using it, and that the master could by the exercise of ordinary care have seen that it was dangerous to the workman using it. In my opinion it is dangerous for judges to arrogate to themselves in such a case as this the right to say that, though the jury have come to that conclusion, their verdict is wrong and must be set aside. For myself I cannot say that in this case. It seems to me that the verdict was not an unreasonable verdict. Whether I should have found the same verdict myself is immaterial. I am not prepared to set the verdict aside. It appears to me that both the judges in the Divisional Court accepted the verdict, as I accept it, but that they differed on the construction of the statute.

I proceed now to consider the question of the construction of the statute. It has been argued that there is no defect in the condition of the machine, if it is fit for the purpose for which it is employed—that is to say, that, if it is fit for the purpose for which it is employed, it is not defective within the meaning of the Act though it is dangerous to the workman using it. Remembering that this is a statute passed to extend the liability of the employer in favour of workmen and for their greater safety, I do not think that, in considering what is a defective machine, we can confine that consideration to the question of the purpose for which it is used. The defect contemplated by the Act is not in my opinion a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workmen using it: and that defect may be either in the original construction of the machine or in the use to which the machine is put. Upon the findings of the jury and the true construction of the enactment I am of opinion that the case is brought within the statute. It must be taken in this case that no objection was made to the mode in which the learned county court judge left the case to the jury, assuming that there was evidence for them; and that no question is raised as to negligence on the part of the plaintiff. The sole question is whether there was evidence of a defect in the machine within the meaning of the Act, and, if it is defective, no question arises as to whether the plaintiff might have avoided the accident by the exercise of reasonable care. In my opinion the judgment of the county court judge was right, and therefore I think the judgment of the Divisional Court ought to be affirmed and the appeal dismissed.

The judgment of Lindley and Lopes, L.JJ., was delivered by

LOPES, L.J. This case raises a most important question under the Employers' Liability Act. In the court below the learned judges differed, Wills, J., holding that the decision of the county court judge was right; Grantham, J., holding it wrong. We agree with the judgment of Grantham, J., and disagree with the judgment of Wills, J. and the Master of the Rolls.

The question is whether there was any evidence of any defect in the condition of the machinery within the meaning of s. 1,

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sub-s. 1, of the Employers' Liability Act. We think that there was not. To determine the meaning of the words "defect in the condition of the machinery" we must look, not only at s. 1, sub-s. 1, but also at s. 2, sub-s. 1. Reading those sections and sub-sections together we think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark, but it is essential that there should be evidence of negligence of the employer or some person in his service entrusted with the duty of seeing that the machine is in proper condition. It must be a defect in the original construction or subsequent condition of the machine rendering it unfit for the purposes to which it is applied when used with reasonable care and caution, and a defect arising from the negligence of the employer. What evidence is there of this? Is there any evidence of the machine being defective even in the abstract? It was perfect in all respects. It was not impaired by use. It had been properly kept up to the mark. The only suggestion is that the wheel, which might have been solid, had holes in it, and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have happened. It is also suggested that the wheel was too close to the table, and that had the wheel and table been further apart the accident would not have happened. There was, however, no evidence worth mentioning of improper construction in this respect. But the plaintiff had used the same kind of machine for thirteen years and had sustained no injury. It is to our mind clear that he would have suffered no injury on the present occasion if he had used proper care and caution. In these circumstances we can see no evidence of any defect in the condition of the machine even apart from negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improve-

ment in machinery. We do not believe that such was the intention of the legislature, nor do we think it was intended to relieve workmen from the exercise of that care and caution, without which most machinery is dangerous. But in our opinion the defect in the condition of the machinery must be such as to shew negligence on the part of the employer. It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used, used by the plaintiff for thirteen years without any complaint or mischief arising, perfect and unimpaired, and never thought by the plaintiff himself to be unsafe. It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinary sharp knife unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens who furnishes it to his workman for him to use with reasonable care. The authorities cited in nowise conflict with the conclusion at which we have arrived.

They are all cases where there was evidence of a defect shewing negligence of the employer. In *Heske* v. *Samuelson* (1) the lift was good, but there was negligence in not providing what was necessary to prevent the coke falling off; the machine was defective as used for coke. In *Cripps* v. *Judge* (2) the ladder was used for a purpose for which it was unfit, and was so used under the personal superintendence of one of the defendants. In *Weblin* v. *Ballard* (3) there was evidence that the ladder was not in a proper condition for the purpose for which it was used, and that the employer knew this. In *Thomas* v. *Quartermaine* (4) there was no defect, and it was held that there must be a defect shewing negligence in the employer in order to bring the case within the Act. In *Yarmouth* v. *France* (5) it was vice in the horse which was complained of, which was known to the defendant's manager. In this case there was, in our opinion, no evidence of negligence to go to the jury. The learned county court judge ought to have nonsuited the plaintiff, or to have directed a verdict for the defendants.

(1) 12 Q. B. D. 30.
(2) 13 Q. B. D. 583.
(3) 17 Q. B. D. 122.
(4) 17 Q. B. D. 414; 18 Q. B. D. 685.
(5) 19 Q. B. D. 647.

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If our view is wrong, it will follow that, whenever a workman uses a dangerous machine and is injured by it without any negligence on the part of the employer, the latter is responsible for the injury, unless he can prove negligence on the part of the workman himself. We cannot construe the Act as warranting any such conclusion. The Act is not directed against dangerous machines but against the negligence of employers. With regard to the general observations of the Master of the Rolls on the Employers' Liability Act, we say that we agree with him that the Act was passed in favour of the workman, and we are ready to give the workman every benefit to which he is entitled under the Act, but we feel bound to construe the Act according to the meaning which we think it bears and was intended to bear. We think the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Pritchard, Englefield, & Co., for R. Riley.*

Solicitors for defendants: *Merriman, Pike, & Merriman, for Partington & Allen.*

E. L.

June 18. IN RE THOMAS. EX PARTE THE COMMISSIONERS OF WOODS AND FORESTS.

Bankruptcy—Disclaimer of Onerous Property—Property held under the Crown—Right of Trustee to disclaim—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 55, 150.

The provisions of s. 55 of the Bankruptcy Act, 1883, as to the disclaimer of onerous property are "provisions relating to the remedies against the property of a debtor" within the meaning of s. 150 of that Act, and are therefore binding upon the Crown.

APPEAL from a decision of the judge of the county court at Cheltenham refusing to set aside a notice of disclaimer by the official receiver as trustee in the bankruptcy.

The bankrupt was entitled to certain shares in a colliery in the Forest of Dean known as the "Success Level Gale," which was held under the Crown. By s. 1 of the Dean Forest Amendment Act, 1861 (24 & 25 Vict. c. 40), the grant of a gale is to be deemed to have conferred on the galee, his heirs and assigns, a licence to work the mine, and also to have conferred on the grantee, his heirs and assigns, an interest of the nature of real

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estate, the licence being conditional on the payment of the rents, royalties, and dues, and the observance of the regulations in force for the working of the gale. By s. 4 the person in actual possession or receipt of the proceeds of the gale is to be liable for the payment of the rent, &c.

The official receiver, who was the trustee in the bankruptcy, gave a notice of disclaimer on September 25, 1886, whereby he disclaimed all the estate and interest of the bankrupt in the gale in question. The Commissioners of Woods and Forests thereupon gave notice of motion to the county court judge to set aside the notice of disclaimer on the ground that the Crown was not bound by the disclaimer clause of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 55).

The county court judge dismissed the motion, and the Commissioners of Woods and Forests appealed.

Gore, (*Sir R. E. Webster, A.G.*, with him), for the appellants. The Crown is not bound by s. 55 of the Bankruptcy Act, 1883. The general rule as to the prerogative of the Crown is that where an Act of Parliament affects any existing prerogative or interest of the Crown the latter is not bound by it unless the statute is made by express terms to extend to the Crown. It was on this ground that it was held under the Bankruptcy Act, 1869, that the relation back of the title of the trustees could not affect the rights of the Crown under an extent issued between the filing of the petition and the appointment of the trustee: *Ex parte Postmaster-General, In re Bonham* (1); for the same reason the Crown is not bound by the Companies Act, 1862: *In re Henley & Co.* (2) The provisions of the Bankruptcy Act, 1883, which are to bind the Crown are specified in terms in s. 150, and s. 55 does not fall within the language or scope of that section.

Muir Mackenzie, for the respondent. The decision of the county court judge was right. The bankrupt's interest in the gale was a freehold interest passing by assignment, and under ss. 1 and 4 of the Dean Forest Amendment Act, 1861, the assignee was personally liable for the payment of the rent and the observance of the regulations in force for the working of the gale, and such an

(1) 10 Ch. D. 595. (2) 9 Ch. D. 469.

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interest is "property" of the bankrupt within s. 168 of the Bankruptcy Act, 1883. Under s. 54 of the Act of 1883 the property of the bankrupt vests in the trustee; it is clear therefore that this interest passed to the official receiver, who is also the trustee, and that he takes it as an assignee would take it. It was held in *Titterton* v. *Cooper* (1) that the only remedy of a trustee in the case of private property was to disclaim, and that, failing to disclaim, he became personally liable; the effect of that decision is to make the respondent liable as trustee to the performance of the obligations to which an assignee of the gale would be liable. It is only in the case of a lease that the trustee requires the leave of the Court before he can disclaim; but this was a freehold interest, and therefore the Court would have no power to give him leave; if therefore the trustee had no power to disclaim this interest he would in the case of a long gale be personally liable for many years to the payment of the rent and the observance of all the rules and conditions. Inasmuch, therefore, as the Act gives the Crown as lessor a right against the trustee in bankruptcy so as to affect him with all the liabilities of an assignee, the Crown cannot set up the liability of the trustee under s. 54 unaccompanied by a corresponding power in the trustee to rid himself of the liability.

Secondly, s. 55 is specially aimed at by s. 150, it being a section "relating to the remedies against the property of a debtor." (2)

Gore, in reply.

CAVE, J. I am of opinion that the decision of the learned county court judge was right. The motion is one on the part of the Crown to set aside a notice of disclaimer by the official receiver, who was the trustee in bankruptcy, by which he disclaimed the interest of the bankrupt in a certain gale in the Forest of Dean. It appears to me that the case falls within the language of s. 150 of the Bankruptcy Act. That section provides that, "Save as herein provided the provisions of this Act relating

(1) 9 Q. B. D. 473.

(2) By s. 150 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown."

to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown." The remedies against the property of the debtor are not put by themselves or under any separate heading in the Act; therefore, wherever in the Act are found provisions as to the remedies against the property of a debtor, they will bind the Crown just as they would a private person. Now in the present case the remedies are by way of covenant, by which the Crown might impose onerous liabilities on the debtor. So far as the debtor himself is concerned, those liabilities have been got rid of; for, a receiving order having been made, no action can be brought against him on the covenants, and the effect of the discharge is that he is absolutely relieved in respect of them. At the same time, by s. 54, the property to which the covenants are attached was transferred to the trustee. Those provisions must, I think, be taken together as one mode of dealing with the remedies against the property of the debtor. The property is transferred to the trustee, and the remedies against the person and property of the debtor are taken away; in substitution for those remedies there is a vesting of the property in the trustee, so that he may dispose of it for the benefit of the creditors, and attached to that is the right to disclaim where the property is onerous. Looking at these sections as a whole, their effect is that the creditors cannot any longer get at the property of the debtor, there being substituted a right to prove against the estate, which is vested in the trustee. It would be outrageous to say that the Crown has any right which would interfere with the vesting of a Crown lease in the trustee for the benefit of the creditors. It is clear that the sections relating to the vesting of the property in the trustee are so connected with those restraining actions against the debtor that we must read them all together, and say that they do relate to the remedies against a debtor's property. If s. 54 is one of those sections, and in my opinion it is, it must be read together with s. 55, as forming one whole, shewing on what terms the property of the debtor vests in the trustee. I think, therefore, that the trustee was clearly entitled to disclaim this onerous property, and that the Crown was, under s. 150, bound by the disclaimer.

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WILLS, J. I am of the same opinion. I merely desire to point out that the consequences of the extremely narrow construction of s. 150 which is contended for by the appellants would be so extravagant that that in itself supplies a very strong argument against their construction of the Act. In my view, the whole group of sections which deal with taking the property out of the bankrupt and vesting it in the trustee should be looked at as one homogeneous whole, and treated as provisions relating to remedies against the property of a debtor.

Appeal dismissed. Leave to appeal granted.

Solicitor for appellants: *The Solicitor to the Commissioners of Woods and Forests.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

W. J. B.

June 8, 23.

[IN THE COURT OF APPEAL.]

IN RE WILLIS. EX PARTE KENNEDY.

Bill of Sale—Validity—Registration—Attornment Clause in Mortgage—Possession by Mortgagee—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 6.

By s. 6 of the Bills of Sale Act, 1878, "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any . . . . debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized under such power of distress; provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent":—

Held (by the Court of Appeal, affirming the decision of Cave, J.), that an attornment clause in a mortgage of land, whereby, by reason of the relation of landlord and tenant thereby created, a power of distress is given to the mortgagee as security for the payment of interest in arrear, is a bill of sale within s. 6, and that the proviso applies only to cases in which the mortgagee, having previously taken possession of the mortgaged premises, has demised them to the mortgagor, and not to a case where the demise is created by the mortgage deed itself.

Dicta in *Hall* v. *Comfort* (18 Q. B. D. 11) disapproved.

APPEAL by the Baroness Willoughby D'Eresby against an order of Cave, J., that she should pay to the trustee in the

bankruptcy of F. W. Willis the sum of 1715*l.* 17*s.*, which she had realized by means of a distress which she had levied upon premises occupied by the bankrupt by virtue of an attornment clause contained in a mortgage deed executed by him.

By a deed, dated January 28, 1884, the bankrupt, in consideration of 20,000*l.* advanced to him by the Baroness, demised the premises known as Willis's Rooms, and the goodwill of the business carried on upon the same, together with all fixtures and fittings, unto the Baroness, by way of mortgage, for the unexpired residues of the terms of years granted respectively by two indentures of lease, to secure the repayment of the sum of 20,000*l.* then advanced by her to him, with interest at 5*l.* per cent. per annum.

The mortgage deed contained all usual clauses, and provided that the Baroness, or the person claiming title under her, might at any time, without any further consent on the part of the bankrupt, or any other person, demise, or enter into any agreement to demise, the premises, or any part thereof, on any terms she or they might think fit; provided that such power should not be exercised until such time as she or they were by law empowered to sell. And by the same indenture it was further witnessed that "for the same consideration the said F. W. Willis doth hereby attorn and become tenant from quarter to quarter to the said Baroness in respect of the said premises, at a yearly rent of 2000*l.* by equal quarterly payments, the first payment to be made on the first day of the month next after any interest hereby secured shall have become in arrear, but all money received by the Baroness for rent due under the attornment hereinbefore contained shall be accepted in the first place in or towards satisfaction of the interest then in arrear;" provided that the attornment should not make it compulsory on the Baroness to collect the rent payable thereunder, and that she should not be accountable to a second mortgagee or any subsequent incumbrancer for any rent that might have been recovered under such attornment; and provided also that the Baroness might at any time after she was by law empowered to sell, without any notice, enter upon and take possession of the premises and determine the last mentioned tenancy.

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On October 1, 1885, there was due to the Baroness for interest on the mortgage 1485*l.* 8*s.* 4*d.*, and on November 7, 1885, Messrs. Wright & Son, sheriff's officers, distrained on her behalf for that amount as for rent due at that date. The distress realized 1715*l.* 17*s.*, of which 1485*l.* 8*s.* 4*d.* was paid over to the Baroness, and the balance of 230*l.* 8*s.* 8*d.* was retained by Messrs. Wright & Son for their costs.

On September 24, 1885, a bankruptcy petition was presented against F. W. Willis, the act of bankruptcy being the failure to comply with the requirements of a bankruptcy notice, and on November 20, 1885, a receiving order was made against him, and on January 26, 1886, he was adjudicated a bankrupt, and subsequently T. Kennedy was appointed trustee of his estate.

The trustee applied to the Court for an order that the Baroness should pay to him the amount realized by the distress, on the ground that the attornment clause was void against him under s. 6 of the Bills of Sale Act, 1878, because it had not been registered as a bill of sale.

1888. April 26. *Cooper Willis, Q.C.*, and *Boydell Houghton*, for the trustee.

French, Q.C., and *R. O. B. Lane*, for the Baroness.

Cooper Willis, Q.C., in reply.

Cur. adv. vult.

1888. May 9. CAVE, J., delivered judgment as follows:—This is an application by the trustee for an order on the Baroness Willoughby D'Eresby to repay to the trustee the value of goods sold under a distress made by her on the property of the bankrupt under the following circumstances. [The learned judge stated the facts and continued:—] The question I have to decide is, whether this distress was unlawful by reason of the 6th section of the Bills of Sale Act, 1878. It is there enacted that "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security

only, shall be deemed to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under such power of distress; provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." It was admitted at the trial that, if the case fell within the section and not within the proviso, the distress became by virtue of the Acts of 1878 and 1882 unlawful, and the trustee was entitled to the money realized.

The first contention on behalf of the respondent was that the case did not come within the section at all, and in support of that proposition the case of *Hall* v. *Comfort* (1) was strongly pressed upon me. In that case a mortgage deed contained a clause by which, for the purpose of securing the punctual payment of the interest, the mortgagor attorned tenant to the mortgagee, and the mortgagee had a power of re-entry for default in payment. Default was made, and the mortgagee commenced an action for the recovery of the premises and applied for judgment under Order XIV. Upon the hearing of the summons, the defendant objected that the attornment clause was void under the Bills of Sale Acts, so that no tenancy had in fact been created. The Court, however, held that the clause was not rendered void by those Acts. The actual decision has no bearing on this case; but it was contended that the reasoning by which it was arrived at is conclusive in favour of the respondent. In order to test that, it is necessary to see what points were actually argued and decided in that case. For the defendants, it was contended that, as the attornment clause purported to create a tenancy to which a power of distress is incident, and so gave power to seize personal chattels, it was, in fact, a bill of sale, and so came within s. 3 of the Act of 1878. It was also contended that it amounted to a licence to take possession of personal chattels as security for a debt, and so came within s. 4. According to the report it was also contended that it came within s. 6, but I cannot understand how that could be, for no personal chattels had been seized or taken under the distress, and there is nothing in that section to

(1) 18 Q. B. D. 11.

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make the attornment itself void. The Lord Chief Justice held that the attornment clause was not within the Act, that it was not a bill of sale within s. 3, nor a licence to take possession of personal chattels as security for a debt within s. 4, because it had not the character or incidents of a bill of sale properly so called, and because, if it were within those sections, every lease would be within the Acts. That reasoning, if I may respectfully say so, is perfectly good, but it applies obviously to ss. 3 and 4 only; for, first, in s. 6 it is expressly provided that an attornment, &c., shall be *deemed* to be a bill of sale, which implies that, but for the section, it would not have been one at all, and makes it one for the purposes of that section only; and, secondly, there is nothing in s. 6 to bring an ordinary lease within the section, and indeed there is an express exception of a mining lease, which, as an anomalous document amounting, not to a demise, but to a sale of the minerals, might otherwise have been thought to have been within the Act. It is more difficult to explain the language of Manisty, J., as he seems to have thought that, if an attornment in a mortgage deed were within s. 6, an ordinary lease would also be within it, which is clearly not the case, so that it seems probable he was referring to ss. 3 and 4, to which this observation as to leases would apply, rather than to s. 6, to which it would not apply. The words of s. 6, omitting what is immaterial for the present purpose, are: "Every attornment whereby a power of distress is given by way of security for any present advance, and whereby any rent is reserved as a mode of providing for the payment of interest on such advance shall be deemed, &c."—why do not these words exactly describe such an attornment clause as that in the present deed? It is said by Manisty, J., in the case cited that, to be within s. 6, the power to distrain must be expressly given, and must be a special power, not the usual power of distress incident to a demise, and that it must be a power given over some particular goods. But such a power would, as it seems to me, be an authority or licence to take possession of personal chattels as security for a debt within s. 4 of the Act. Consider the consequences which would follow from holding that such an attornment clause was not within s. 6. A money-lender's security is often taken upon goods or premises

occupied by the borrower. In such a case the money-lender need only resort to the device of a sub-demise and an attornment clause, and his power to seize, so far as the rent reserved goes, provided it is a fair rent, will be free from all the restrictions of the Bills of Sale Acts. It is also said that, if this construction is adopted, an attornment clause, so far as it confers a power of distress, will no longer be of any value. I think that is so, but I also think that that is exactly what the legislature intended when s. 6 was enacted, as enabling a mortgagor to retain the outward semblance of wealth, while secretly giving his mortgagee power to take possession of the mortgagor's goods and chattels to the exclusion of the other creditors. Moreover, it does not appear that in *Hall* v. *Comfort* (1) the attention of the Court was drawn to *Ex parte Jackson* (2), in which Baggallay, L.J., expressed a clear opinion that such an attornment clause as was used in the present case would come within s. 6 of the Act of 1878. For these reasons I have come to the conclusion that the clause in question does fall within that section.

The next contention was that, if the case came within the 6th section, it also came within the proviso at the end, "that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." In support of this contention the cases of *In re Stockton Iron Furnace Company* (3) and *Ex parte Punnett* (4) were cited. In the first of those cases James, L.J., held that, when by the mortgage deed an actual lease is created with a reservation of rent, the mortgagees are as much mortgagees in possession for all purposes of taking the account of what is due on the mortgage, as if they had granted the lease to some new lessee and had given notice to that lessee to pay the rent to them. In the second case a mortgagor had created two mortgages, and had attorned tenant to the first mortgagee in the first mortgage deed, and also to the second mortgagee in the second mortgage deed. The Court held, that the right of the second mortgagee to distrain under his attornment

(1) 18 Q. B. D. 11.
(2) 14 Ch. D. 725, 733.
(3) 10 Ch. D. 335.
(4) 16 Ch. D. 226.

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clause was not affected by the prior attornment to the prior mortgagee. Mr. French sought to make use of these cases in this way. He contended that the first established that a mortgagee with an attornment clause was a mortgagee in possession within the meaning of the proviso, and that the second mortgagee would be within the section and outside the proviso, thus seeking to meet a difficulty which had been pressed upon him that his construction of the proviso would leave nothing for the body of the section to operate upon. But, as it seems to me, a second mortgagee with an attornment clause must occupy as regards a third incumbrancer the position which the first occupies with regard to the second, and, if the first must be treated, as between himself and the second mortgagee, as being a mortgagee in possession, so must the second mortgagee be treated as regards a third, and so also must the third, if he has an attornment clause, as against the fourth, if there is one. In that case every mortgagee with an attornment clause would come within the proviso, and nothing would be left for the section to operate on. The words in the proviso are "which the mortgagee, being in possession, shall have demised," and I think these words can only apply to a case where the mortgagee has taken actual possession under his mortgage deed, and has subsequently demised to the mortgagor, and not to a case where there has been no actual taking of possession, and the demise has been created by the mortgage deed itself. This construction seems to me, not only more consonant with the language of the proviso, but also more calculated to secure the objects of the section. If Mr. French's construction is correct, the creditors might see all the chattels on the mortgagor's premises swept away by the mortgagee, although nothing had taken place which could lead them to suspect that he had given any one the power of seizing them to the exclusion of the other creditors, while in the other case the chattels could only be swept away where the mortgagee had actually taken possession, a fact which it is difficult, if not impossible, to keep secret. For these reasons I am of opinion that the trustee is entitled to the order he asks for, with costs.

H. L. F.

Against this decision the Baroness appealed.

1888. June 8. *French, Q.C.*, and *R. O. B. Lane*, for the appellant. The trustee claimed repayment of the proceeds of the distress, on the ground that the mortgage deed is a bill of sale within the meaning of s. 6 (1) of the Bills of Sale Act, 1878, and that it is void against him for want of registration. The decision is inconsistent with *Hall* v. *Comfort* (2), as well as with the principle of *Batcheldor* v. *Yates*. (3) The words of s. 6—"for the purpose of such security only"—point to a fictitious tenancy. In the present case there was a real tenancy and a real rent, and s. 6 does not apply to such a case. The evidence shews that the rent reserved was about the true letting value of the property. The effect of such an attornment clause is to make the mortgagee accountable as a mortgagee in possession: *In re Stockton Iron Furnace Co.* (4) It would be a mere idle form to require the mortgagee to turn the mortgagor out of possession and then reinstate him, which he could do the very next day. The test of the validity of such attornment clauses is whether the rent reserved is a real rent, and the tenancy a real tenancy: *Ex parte Williams* (5); *In re Stockton Iron Furnace Co.* (6); *Ex parte Jackson* (7); *Ex parte Voisey*. (8) The decision in *Hall* v. *Comfort* (2) is directly in favour of the appellant. The test is not simply whether the clause was inserted with the view of giving the mortgagee an additional security in the event of the mortgagor's bankruptcy. There being affirmative evidence that the tenancy was a bonâ fide one, the onus is on those who allege mala fides.

(1) Sect. 6: "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

"Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

(2) 18 Q. B. D. 11.
(3) 38 Ch. D. 112.
(4) 10 Ch. D. 335, 356.
(5) 7 Ch. D. 138.
(6) 10 Ch. D. 335.
(7) 14 Ch. D. 725.
(8) 21 Ch. D. 442, 459.

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The result of allowing the appeal will not be to render s. 6 of no effect; it will apply to all fictitious tenancies.

Cooper Willis, Q.C., and *Boydell Houghton*, for the trustee. Most of the cases cited were either decided before the passing of the Bills of Sale Act, 1878, or related to mortgages executed before that date, and therefore the Act did not apply. In those cases the Court was dealing with frauds on the law of bankruptcy; and no question arose upon the Bills of Sale Act. The question was, whether a real relation of landlord and tenant had been created—whether the mortgagee was, within the meaning of s. 34 of the Bankruptcy Act, 1869, a "landlord or other person to whom any rent was due" from the tenant, and was entitled, therefore, to distrain: *Ex parte Punnett.* (1)

The object of s. 6 was to invalidate all attornment clauses in mortgages (subject to the proviso in the section), unless the deed was registered as a bill of sale; the validity does not depend on the amount of the rent reserved. The proviso in s. 6 requires that there should be actual possession by the mortgagee. In the present case the mortgagee has never been in possession otherwise than by virtue of the attornment clause. Possession by a mortgagee imposes on him a particular liability to account. If possession by virtue only of the attornment clause is enough, there would be "possession" in every case, and s. 6 would be rendered of no effect at all. Moreover, in the present case the liability to account as mortgagee in possession is expressly excluded by agreement. This is a fraud on subsequent mortgagees, and it is repugnant to the character of a mortgagee in possession.

Again, the rent reserved by the attornment clause is not to become payable until the interest on the mortgage debt is in arrear. This is an attempt to give a peculiar right to the mortgagee in the event of the mortgagor's bankruptcy.

[LORD ESHER, M.R. In *Stanley* v. *Grundy* (2), Bacon, V.C., held that an attornment clause in a mortgage deed did not impose on the mortgagee the liability to account as mortgagee in possession.]

Sect. 6 means that, where there is an attornment and nothing

(1) 16 Ch. D. 226. (2) 22 Ch. D. 478.

more, and it is perfectly clear that the clause was inserted only for the purpose of securing either the principal or the interest of the mortgage debt, then the mortgage deed is to be deemed to be a bill of sale. But it is possible that the mortgagee may have taken possession of the property, and, if he has done so, and has then demised it to the mortgagor, the proviso applies, but not otherwise. The proviso cannot be construed as excepting every attornment at a reasonable rent. If that had been intended there would have been an express provision to that effect in the Act. The proviso was meant to protect a real lease; a mere quarterly tenancy, such as that which is here created, is not a lease at all. Sect. 4 of the Act, which defines the expression "bill of sale," has no application to this case; s. 6 was intended to bring in something which was not included in s. 4. The expression used in s. 6 is, "the mortgagee, being in possession, shall have demised," that must mean that the mortgagee must first be in possession, and then demise.

French, Q.C., in reply. An attornment clause in a mortgage of real estate cannot be registered as a bill of sale; it does not deal with any specific chattels. The goods of a stranger might be taken under a distress for rent. The object of the proviso in s. 6 was to except a real tenancy. *Daubuz* v. *Lavington* (1) shews that under such a clause a real tenancy is created. No distinction is made between possession and actual possession.

The attornment clause does not necessarily make the loose chattels on the land subject to the security; the mortgagor can remove them at any time so long as there is no distress for rent. If it is necessary that the mortgagee should take actual possession, the Court of Appeal must have been wrong in saying in *In re Stockton Iron Furnace Co.* (2) that an attornment clause made the mortgagee liable to account as a mortgagee in possession.

Cur. adv. vult.

June 23. LINDLEY, L.J. The question raised by this appeal is, whether the trustee in the bankruptcy or the mortgagee is entitled to a sum of money which represents the proceeds of the sale of

(1) 13 Q. B. D. 347. (2) 10 Ch. D. 335.

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certain chattels on which the mortgagee distrained by virtue of an attornment clause in her mortgage deed. [The Lord Justice stated the provisions of the deed, and continued:—] The clause, which provides that the mortgagee shall not be accountable to any subsequent incumbrancer for any rent which might have been recovered under the attornment, is not a very common clause, but it was obviously inserted in order to prevent any doubt arising whether the attornment clause rendered the mortgagee accountable as a mortgagee in possession—that is to say, not only for the rents which she might actually receive, but for rents which she might, but for her wilful default, have received. It was intended to protect her from the ordinary liability of a mortgagee in possession. I do not, however, think that that clause really affects the question which we have now to decide. The attornment clause obviously created the relation of landlord and tenant between the mortgagee and the mortgagor, at the rent of £2000, payable quarterly. There can be no question about that, after the various recent decisions on the point.

Then arises the question, what is the effect of the attornment? and that depends, mainly, not upon ordinary mortgage law, but upon the law contained in the Bills of Sale Act, and more particularly upon the 6th section of the Bills of Sale Act of 1878. That section is expressly addressed to attornment clauses, and to instruments or agreements whereby a power of distress is given by way of security for money lent. The section does not apply to ordinary leases, nor is there, so far as I know, any section in any of the Bills of Sale Acts which applies to the landlord's power of distraining for rent under an ordinary lease. I make that remark for the purpose of at once dealing with *Hall* v. *Comfort* (1), in which it was suggested that, if this section applies to mortgagees, it must also apply to all leases. But, if you examine s. 6, you will see that it is confined to attornments, and to powers of distress which are given by way of security for money advanced. [The Lord Justice read the section.] There follows a proviso, which I will not read yet; and I pause for the moment to consider the effect of the enactment in s. 6. In *Hall* v. *Comfort* (1) it was said, I think mainly by Manisty, J., but I think

(1) 18 Q. B. D. 11.

also by Lord Coleridge, C.J., that it did not apply to attornments in mortgages, and Manisty, J., appears to have thought that it did not apply to attornments, unless they are followed by some express power of distress. If I understand him correctly, that is the view he took. It appears to me that the application of this section to attornments cannot depend upon whether the attornment clause is followed by an express power of distress, but that it applies equally if there is no such express power. The true meaning of this section I understand to be this, that every attornment by way of security for money lent is struck at, and that the section also strikes at some things which are not attornments, viz. instruments or agreements whereby powers of distress are given by way of security for any advance or sum of money, and it is obvious that the draftsman was aware of the fact that there are two forms of mortgage which are more or less in use. Sometimes a mortgage deed is made without any attornment clause, but it contains an express power for the mortgagee to enter and distrain. Such a power is not so beneficial to the mortgagee as the power of distress which is by law incident to an attornment clause. Under an express power of distress the mortgagee can only take the mortgagor's goods; under the implied power of distress the mortgagee can, as a landlord, take any goods he finds on the demised premises. The consequence is that express powers of distress are not so common as they used to be; the attornment clause has taken their place to a great extent. This section includes (and it is important to bear that in mind) both attornment clauses and express powers of distress. It makes them both, provided they are given for the purpose of securing interest on advances, bills of sale, and, if the section stood there, I should have no difficulty in coming to the conclusion that this attornment clause was within the enacting part of the section.

But then comes the proviso, which is excessively puzzling. It is so worded that I feel very great difficulty in giving effect to all the words which I find in it. [The Lord Justice read the proviso.] It does not say that "nothing in this Act shall apply to an attornment at a fair rent." Whether that is the meaning is the question which we have to decide. But the proviso says,

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that nothing in the section shall "extend to any mortgage," and that at once introduces a difficulty. How can it affect a mortgage, unless the mortgage contains an attornment clause or some other clause which would be struck at by the previous part of the section? Then it is not to "extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." Now does that protect an attornment clause at a fair rent which is not preceded by possession by the mortgagee? The proviso appears to contemplate a case in which the mortgagee has been in possession, and, being in possession, has made the demise. If that is so, this particular security, or any security like it, cannot be brought within the proviso; for, even assuming that the effect of the attornment clause is to make the mortgagee a mortgagee in possession, that possession is the legal consequence of the attornment clause, and does not precede it. I cannot think that this proviso in the statute was intended to protect a deed which, at one and the same time, is a mortgage and a lease, and which by virtue of that lease constitutes the mortgagee a mortgagee in possession. I must confess that I can find no construction which will give full effect to both the word "mortgage" in the earlier part of the proviso, and to the words "being in possession" in the subsequent part. But I think that the words "the mortgagee, being in possession" were used for a purpose, and that those words, rather than the word "mortgage," are the key to the meaning. If we adopt the opposite construction, and say that all attornments at fair rents are saved by this proviso, we shall be giving no effect whatever to the expression "the mortgagee, being in possession."

In this state of doubt and perplexity it appears to me that we ought to look a little further, and see what was the general object of the Bills of Sale Acts. If we look at the Act of 1854 and the Act of 1878 we see what the legislature were aiming at. They were aiming at rendering it compulsory on lenders of money on the security of goods and chattels to register their securities. That was the leading idea. But then the legislature saw that, in carrying out that idea, they might possibly be fettering

commerce to a very great extent, and therefore a number of exceptions are introduced, covering bills of lading and such-like things, and language is used which goes to shew that it was not intended to deprive a landlord of his common law power of distraining for rent in arrear, although it is obvious that, in that way, he is obtaining goods and chattels as security for the rent which is in arrear. But what the legislature had in their minds was the lending of money on the security of chattels, and the idea which runs through the whole is this: If you lend money on the security of chattels, you must do it by a registered bill of sale, and they extend that to an attornment in a mortgage, but they except out of the extension the case of a demise by a mortgagee in possession.

Upon the true construction of this Act, and, having regard to both the language used and the general objects of the Act, it appears to me that it is impossible to bring within this proviso any case except one in which the mortgagee has been in possession, and, being in possession, has demised to the mortgagor at a fair and reasonable rent. I think, therefore, that the decision of Cave, J., is correct, and that the title of the trustee must prevail, and we must dismiss the appeal.

LOPES, L.J. I entirely agree with the judgment and with the reasoning of Cave, J.

The case depends upon the construction of s. 6 of the Bills of Sale Act, 1878. To my mind the words in the earlier part of the section exactly describe the attornment clause in this deed, and, if there were nothing more in the section, I should add nothing. But there is a proviso to the section, and the question arises whether the proviso takes this case out of the earlier part of the section. I think it does not. The benefit of the proviso is limited to cases where the mortgagee, "being in possession," has demised to the mortgagor. I think this means that there must be an actual possession by the mortgagee, and a subsequent demise to the mortgagor. The effect of this protection is doubtless very limited, because actual possession is seldom taken by a mortgagee, and followed by a subsequent demise to the mortgagor. I believe, however, that the legislature intended the

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protection to be very limited, because they sought by this section to strike at, and practically invalidate, attornment clauses so far as they confer powers of distress, and thus to prevent an evasion of the Bills of Sale Act which had previously been most successfully effected by such clauses. I do not say that the proviso is as clear as it might be, but I have no doubt that it means what I have stated.

The Baroness, therefore, is not within the proviso, and the decision of Cave, J., must be maintained.

LORD ESHER, M.R. I will not deliver any judgment, because I am not prepared to say that I disagree with the judgments of my learned Brethren. But I have felt extreme doubt about the case, and, if I may say so with respect to them, my doubt has been intensified by listening to the most able and elaborate judgment of my Brother Lindley.

The COURT gave leave to appeal to the House of Lords.

Appeal dismissed.

Solicitors for appellant: *Travers-Smith & Braithwaite.*
Solicitors for trustee: *Blewitt & Tyler.*

W. L. C.

June 26.

SANDFORD *v.* CLARKE.

Nuisance—Reversioner, Liability of—Landlord and Tenant—Weekly Tenancy—Injury caused by defective Repair of demised Premises.

The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shewn to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident:—

Held, that, having regard to the nature of the tenancy, there had been a reletting of the premises after the nuisance was created and that the defendant, as reversioner, was liable.

Gandy v. *Jubber* (5 B. & S. 78, 9 Ib. 15) discussed.

APPEAL from the judge of the Bloomsbury County Court. The action was brought against the landlord of a house for allowing a coal-plate (or covering to a cellar) in the pavement in front of the house to be out of repair, and thereby causing an injury to

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the plaintiff, a passer-by, whose foot slipped through the hole. It appeared at the trial that the house to which the cellar belonged was let upon a weekly tenancy, and that the same tenant had been in possession for about two years before the accident; no evidence was given as to the state of repair of the coal-plate at the commencement of her tenancy, but it was proved that it was out of repair about a fortnight after she entered into possession, and that it remained so down to the date of the accident. The judge nonsuited the plaintiff on the ground that the tenant was primarily responsible, and that the landlord was only responsible if the premises were out of repair at the date of the letting. The plaintiff moved to set aside the nonsuit and for a new trial.

Lynden Bell, for the plaintiff. The landlord is responsible for injury to a stranger caused by a nuisance of a permanent character where the premises at the time of the letting were in a dangerous or ruinous condition: *Todd* v. *Flight* (1); *Nelson* v. *Liverpool Brewery Company*. (2) Even where the nuisance is not in existence at the commencement of the tenancy if the landlord re-let the premises or, having the opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance: *Rex* v. *Pedly* (3), where Littledale, J., says, "If, after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable." This view was adopted by the Court of Queen's Bench in *Gandy* v. *Jubber* (4), where it was held that a tenancy from year to year was not to be treated as a continuous tenancy, but as re-commencing every year, and that, therefore, a landlord who had had the opportunity of determining a tenancy from year to year after the erection of the nuisance by the tenant was liable in damages to a passer-by. That case went to the Exchequer Chamber, but was settled after argument and before judgment;

(1) 9 C. B. (N.S.) 377.
(2) 2 C. P. D. 311.
(3) 1 A. & E. 822.
(4) 5 B. & S. 78.

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a judgment was, however, prepared, though never delivered (1), by which the decision was reversed. This judgment of the Exchequer Chamber proceeded upon the sole ground that the Court below had misapprehended the peculiar characteristics of a tenancy from year to year, and it was held that in such a tenancy there was not in contemplation of law a recommencing or reletting at the commencement of each year; in all other respects the Exchequer Chamber affirmed the view of the Court of Queen's Bench as to the liability of a landlord for premises let or relet in a dangerous state. In a weekly tenancy a landlord is entitled to re-enter at the end of each week, and in contemplation of law there is a reletting every week; the defendant is therefore liable.

Sidney Strong, for the defendant. A weekly tenancy is within the principle of the judgment of the Exchequer Chamber in *Gandy* v. *Jubber* (2), and the tenancy is a continuous one and does not amount to a reletting every week.

WILLS, J. I think that this nonsuit was clearly wrong, and that there must be a new trial. I express no opinion as to the merits of the plaintiff's case. His case is that a considerable time before the accident happened this cellar was structurally defective, and that the accident took place in consequence of such defect. The house to which the cellar belonged was let to a weekly tenant, and I think that under the circumstances the continuation of the tenancy involved the same liability as an actual reletting, for it is purely a matter of contract between the parties that the tenancy shall continue, and at its determination at the end of any week the landlord could enter and make the necessary repairs. There is, therefore, nothing to take this case out of the ordinary rule that the owner of property is liable for the consequences of the defective state of repair of the property if it is defective when let by him. In *Gandy* v. *Jubber* (2) the tenancy was from year to year, and the Court of Queen's Bench held that the landlord might have re-entered at the end of each year, and that he was therefore liable for the consequences resulting from an accident caused by a grating in front of the house

(1) 9 B. & S. 15.

(2) 5 B. & S. 78; 9 B. & S. 15.

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having been for some years in a defective state. In the Exchequer Chamber the decision was overruled on the ground that it proceeded upon a misapprehension of the peculiar relations existing between the landlord and tenant in the case of a tenancy from year to year. Such a tenancy requires something to be done between the landlord and tenant in order to determine the tenancy, but no such modification is imported into a tenancy from week to week. This case clearly falls within the principle laid down in the Court of Queen's Bench in *Gandy* v. *Jubber* (1), which was not doubted in the Exchequer Chamber.

GRANTHAM, J., concurred.

Rule absolute for new trial.

Solicitor for plaintiff: *R. H. Ward.*

Solicitors for defendant: *Denton, Hall & Burgin.*

W. J. B.

ASHBY *v.* COSTIN.

March 23; *June* 12.

Benefit Society—Insurance—Administration—Death of Member intestate—Payment of Death Allowance by Committee—Right of Administrator of Deceased Member to recover from Payee.

The deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society, signed a declaration agreeing to be bound by the rules of the society, and authorizing the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered and authorized the committee to pay the allowance to such person or persons as in their discretion they might think fit; and it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there were no surviving relatives and no special bequest, only the funeral expenses should be defrayed by the society, and that where the allowance had been once paid neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the defendant, his sister. The plaintiff, as administrator of the deceased, having brought an action against the defendant to recover the money so paid to her:—

Held, that the rule constituted the contract between the member and the

(1) 5 B. & S. 78.

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society as to the payment of the money; that the death allowance was not the property of the member during his life, and in the absence of a bequest by will was not assets for the payment of his debts, and that therefore the plaintiff could not recover.

APPEAL from the County Court of Hertfordshire holden at Watford.

The plaintiff was the administrator of Alfred Ashby, a servant in the employ of the London and North Western Railway Company, who died from an accident in the course of his employment; and the action was to recover 80*l.* paid to the defendant by an unregistered friendly society called the London and North Western Railway Insurance Society, the amount of insurance payable in respect of the death of the deceased, who was a member of the society. The facts and arguments are fully stated in the judgment, and it is sufficient here to add that the material parts of the declaration form which had been signed by the deceased upon his application for admission to the society, were as follow: "I request to be admitted a member of the London and North Western Railway Insurance Society under Scale A. (1), and agree to be bound by the rules thereof, a copy of which I have received. I authorize the deduction from my wages of the sum specified in the rules, according to my position in the company's service, for securing to myself, or to my representatives in case of my death, the benefits of the society."

The county court judge gave judgment for the plaintiff. The defendant appealed.

1888. March 23. *Blackwell*, for the defendant.

C. E. Jenkins, for the plaintiff.

Cur. adv. vult.

1888. June 12. The judgment of the Court (Cave and Grantham, JJ.) was read by

CAVE, J. This is an appeal from the decision of the judge of the county court at Watford. The action was brought by the plaintiff as administrator of Alfred Augustus Ashby deceased, to

(1) Under Scale A. a member became entitled to additional benefits in consideration of his relinquishing any claims which he might have against the company under the Employers' Liability Act, 1880.

recover from the defendant the sum of 80*l.* paid to her by the London and North Western Railway Insurance Society under the following circumstances.

The deceased was a member of the society under Scale A and had filled up and signed and transmitted to the secretary of the society the declaration form contained in Appendix I. to the rules. Rule 27 is as follows: "Before payment of any death allowance, the committee shall be entitled to call for and be furnished with such information and particulars as in their discretion they may think necessary to establish the validity of the claim of the person or persons claiming the allowance of the deceased member; and the committee are hereby empowered and authorized to pay such allowance to such person or persons as in their discretion they may think fit; it being always understood that the extent to which the committee shall be bound to the payment of death allowances shall be, in the case of a married man, to his widow or children, or to his parents, or to any of them, in such proportions as the committee shall determine; and in the case of a single man, to his parents, brothers, or sisters, or any of them, in such proportions as aforesaid, unless the deceased members, married or single, have otherwise bequeathed the money, in which case it shall be paid to the person to whom it has been so bequeathed; but should there be no such surviving relatives, nor any such special bequest, then the funeral expenses only, to a reasonable amount, shall be defrayed by the society. But every such case, and all other cases, shall be subject to the decision of the committee, and, such allowance having been once paid, neither the committee nor the society shall be liable to any further claim in respect thereof."

As we read this rule it forms the contract between the member and the society as to the payment of the death allowance, and by it the society binds itself to pay the death allowance to the person to whom the member may have bequeathed the same, and in the absence of any bequest, in the case of a married man, to his widow or children, or to his parents, or to any of them, in such proportions as the committee shall determine, or, in the case of a single man, to his parents, brothers, or sisters, or any of them in such proportions as aforesaid. In the absence of any

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such surviving relatives the society are to pay only the member's funeral expenses. In Ashby's case the death allowance amounted to 80*l.* He had not bequeathed it, and was a single man, and under these circumstances the society paid the amount to the defendant, his sister. It cannot be contended that the society have not fulfilled their obligation to the deceased, but it is said that the sum was assets for the payment of the debts of the deceased, and that the defendant in receiving it acted as executrix de son tort, and is liable to the administrator. We cannot agree with that contention.

The money was not the money of the deceased, although it was payable out of a fund to which he and others contributed. It was to be paid according to the bargain made by the deceased with the other members. He had a power to bequeath the whole amount to anyone he might select; and we think it is tolerably clear that, if he had exercised this power, the amount would have been assets for the payment of his debts: *Holmes* v. *Coghill* (1), and see Williams on Executors, 7th ed., vol. ii., p. 1686. But he did not in fact exercise the power; and by the contract between the society and himself the money was to be paid to certain prescribed relatives in such proportions as the committee of the society should determine. It was contended that the language of rule 27 was only intended to provide some one who should be able to give the society a good discharge for the money, but we cannot so read it. If there are no surviving relatives of the classes indicated, the society will after paying the funeral expenses be entitled to retain the balance of the death allowance, and in our judgment, if no will is made, they and not the member are to determine who among the relatives indicated are to have the benefit of the allowance. It is said that the declaration form in Appendix I. supports the contention of the plaintiff as shewing an intention to secure the benefits of the society to the member's representatives in the case of his death. To us, however, it seems clear that these words are used generally to cover the executor or administrator or the legatee in the case of a bequest, or the relatives selected by the committee in the absence of a bequest. It must be remembered that the death allowance is not the property of

(1) 7 Ves. 499; 12 Ves. 206.

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the member in the sense of its belonging to him absolutely in his lifetime; he has no right to it but such as the rules give him. If he chooses to bequeath it by his will, it will, as we have already said, be assets; but, if he does not choose to exercise this power, the committee and not the member will determine which of his relatives will get the allowance and in what proportions, and, unless he leaves surviving relatives within certain degrees, the balance after payment of his funeral expenses will remain the property of the society.

For these reasons we cannot agree with the learned judge that this sum was an asset for the payment of the debts of the deceased member; and, consequently, the judgment for the plaintiff must be set aside, and judgment be entered for the defendant with costs here and below.

Appeal allowed.

Solicitor for appellant: *W. G. Morris.*

Solicitors for respondent: *Godfrey & Webb.*

W. J. B.

[IN THE COURT OF APPEAL.]

July 20.

IN RE EMERY. EX PARTE CHIEF OFFICIAL RECEIVER.

Bill of Sale—Renewal of Registration—Bill of Sale void at Commencement of Bills of Sale Act, 1878, *for want of renewal of Registration—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *ss.* 11, 14, 23.

Where a bill of sale was, at the commencement of the Bills of Sale Act, 1878, void for want of renewal of registration, the time for renewal cannot be extended under s. 14 of that Act.

Decision of Cave, J., in *Askew* v. *Lewis* (10 Q. B. D. 477) approved.

APPEAL against an order of Cave, J., by which it was declared that a deed of October 26, 1857, was void as against the trustee in the bankruptcy of Henry Emery. The deed in question was a voluntary post-nuptial settlement of furniture made by the bankrupt for the benefit of his wife, himself, and the children of the marriage. The deed was registered as a bill of sale, under the Bills of Sale Act, 1854, on November 7, 1857. It was not re-registered in accordance with the provisions of s. 4 of the Bills of Sale Act, 1866. After the passing of the Bills of Sale Act, 1878, the deed was, on April 30, 1881, re-registered in pursuance of an

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order of Huddleston, B., which purported to be made under s. 14 of the Bills of Sale Act, 1878, and it was again re-registered on April 29, 1886.

CAVE, J., held that the re-registration on April 30, 1881, was not authorized by s. 14 of the Act of 1878, and was ineffectual, and that the furniture was at the time of the filing of the bankruptcy petition in the possession or apparent possession of the bankrupt, and that, therefore, the trustee in the bankruptcy was entitled to it. The trustees of the settlement appealed.

Reid, Q.C., and *S. H. Leonard*, for the appellants. Upon the true construction of s. 23 (1) of the Bills of Sale Act, 1878, the re-registration of the deed was effectual. The decision of Cave, J., to the contrary in *Askew* v. *Lewis* (2) was erroneous, and it is not

(1) By s. 11 of the Bills of Sale Act, 1878: "The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

"The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security."

Sect. 14: "Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct."

Sect. 23: "From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed: provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as regards bills of sale so executed the Acts hereby repealed shall continue in force.

"Any renewal after the commencement of this Act of the registration of a bill of sale executed before the commencement of this Act, registered under the Acts hereby repealed, shall be made under this Act in the same manner as the renewal of a registration made under this Act."

(2) 10 Q. B. D. 477.

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binding on this Court. The Act of 1878 makes no distinction between bills of sale, executed before its commencement, which had become void before that date for want of re-registration, and bills of sale executed before its commencement, the time for the re-registration of which had not then expired, and it is admitted that in the latter case the time for re-registration could be extended by the Court.

Even if the re-registration was ineffectual, still the evidence shews that the chattels comprised in the deed were not at the time of the filing of the petition in the possession or apparent possession of the bankrupt.

Sidney Woolf, for the official receiver, was called upon only as to the question of possession. He argued that Cave, J., had come to a right conclusion upon the evidence.

Leonard, in reply.

LORD ESHER, M.R., held, upon the evidence, that the furniture was in the actual or apparent possession of the bankrupt at the date of the filing of the petition. His Lordship continued: Then arises the question whether the renewal of the registration of the deed was effectual—in other words, whether we agree with the decision of Cave, J., in *Askew* v. *Lewis* (1), and the reasons which he gave for it. I have no doubt on that point. I think the decision was perfectly right. The question depends upon the construction of ss. 11, 14, and 23, of the Act of 1878. In my opinion s. 11 does not apply to bills of sale which were more than five years old, and which had not been re-registered at the date of the commencement of the Act; and s. 14 only applies to bills of sale which are brought within the Act, i.e., which are within s. 11. Therefore, this deed is not within s. 14, and, if so, it is not, within the meaning of s. 23, "expressly mentioned with respect to renewal of registration." It could not, therefore, be effectually re-registered under the Act of 1878, and it is void as against the trustee in the bankruptcy as regards the chattels comprised in it, which were in the actual or apparent possession of the bankrupt.

LINDLEY, L.J. I am of the same opinion. When the Act of 1878 came into operation the deed was void as a bill of sale, and

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I think that the renewal of the registration was ineffectual to resuscitate it. In my opinion *Askew* v. *Lewis* (1) was rightly decided. Sect. 14 is a proviso upon, or a qualification of, s. 11, and a bill of sale which could not be registered under s. 11 could not be re-registered under s. 14. Upon the evidence I cannot come to any other conclusion than that the chattels were in the actual or apparent possession of the bankrupt.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellants: *A. M. Bramall.*
Solicitor for respondent: *J. W. Sykes.*

W. L. C.

July 25, 30.

[IN THE COURT OF APPEAL.]

IN RE AN ARBITRATION BETWEEN MITCHELL & IZARD AND THE GOVERNOR OF CEYLON.

Arbitration—Incorporation in Submission of Common Law Procedure Act, 1854—Power to revoke Submission—3 & 4 Wm. 4, c. 42, s. 39—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 17.

By a contract in writing it was provided that disputes between the contracting parties should be referred to arbitration. The contract did not contain an express stipulation that the submission should be made a rule of Court, but by one of its clauses it was agreed that the provisions of the Common Law Procedure Act, 1854, with regard to arbitration, as far as they were applicable, should apply to the arbitration therein agreed to. A dispute arising out of the contract having been referred, one of the parties revoked the submission. The arbitrator proceeded ex parte, and made his award:—

Held, that the submission was not duly revoked; that the incorporation in the submission of the Common Law Procedure Act, 1854, was equivalent to an agreement that the submission should be made a rule of Court; and that the case was, therefore, within the provisions of 3 & 4 Wm. 4, c. 42, s. 39, and the submission was not revocable without the leave of the Court.

MOTION to set aside an award on the ground that the authority of the arbitrator had been revoked before the making of the award.

The applicants, Messrs. Mitchell & Izard, had in the year 1882 entered into a contract with the Governor of Ceylon, on behalf of the colony, for the construction of waterworks at Colombo.

(1) 10 Q. B. D. 477.

The contract contained a provision that differences and disputes not otherwise provided for should, on the demand in writing of either party, be referred to the sole arbitration and award of the consulting engineer, whose decision was to be final, and by clause 85 of the contract it was provided as follows:—"As far as the same are applicable and not hereby varied the provisions of the Common Law Procedure Act, 1854, or any statutory modification thereof for the time being in force with reference to the settlement of disputes by arbitration, shall apply to the arbitration agreed to in these presents." Differences having arisen, they were referred upon the demand of the governor to the consulting engineer, who duly gave notice of the time and place for holding the arbitration. The contractors, after entering a protest against the arbitration being proceeded with before they had time to properly prepare their case, declined to appear before the arbitrator, who thereupon proceeded ex parte. Three days after the ex parte hearing, and about six weeks before the making of the award, the contractors revoked the authority of the arbitrator.

1888. May 5, 8. *Finlay, Q.C.*, and *Reginald Brown*, for the applicants. The authority of the arbitrator was sufficiently revoked. Clause 85 has no force, and adds nothing to the agreement; the Common Law Procedure Act, 1854, is a statute of general application, and would be operative whether incorporated or not in the agreement between the parties. The clause was not inserted in the agreement for the purpose of adding anything to it, but of calling the attention of the parties to the provisions of the Act of 1854 referring to arbitration. Further, s. 17 of the Act of 1854 is only permissive; it allows the submission to be made a rule of Court at the option of either party, and does not prevent the revocation of the submission if it has not actually been made a rule of Court: *In re Rouse and Meier* (1); *Thomson* v. *Anderson* (2); its incorporation in the agreement between the parties has not, therefore, the effect of bringing the case within 3 & 4 Wm. 4, c. 42, s. 39, which only applies where the parties agree that the submission shall be made a rule of Court. The

(1) Law Rep. 6 C. P. 212. (2) Law Rep. 9 Eq. 523.

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expression "shall be" made a rule of Court must mean something more than "may be" made at the option of either party; and until a party has exercised the option of making the submission a rule of Court, each side reserves all its common law rights of revocation. The sections of the Act of 1854 incorporated in the agreement by clause 85 are simply those relating to the procedure on an arbitration, of which s. 17 is not one.

[They also cited *Fraser* v. *Ehrensperger* (1); *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe* (2).]

J. G. Wood (*Sir R. E. Webster, A.G.*, with him), for the respondent. The authority of the arbitrator was not revoked. The incorporation of s. 17 of the Common Law Procedure Act, 1854, means the same thing, and has the same effect, as an agreement between the parties that the submission shall be made a rule of Court. The word "shall" is not imperative; it merely means that if one of the parties chooses to make the submission a rule of Court, the other cannot prevent him; it is used in the same way as in forfeiture clauses in leases, where it is stipulated that in certain events the lease "shall be" void, which means no more than that it shall be voidable by the lessor. The incorporation of s. 17 of the Act of 1854, therefore, brings the case within s. 39 of 3 & 4 Wm. 4, c. 42, and the submission is not revocable without leave. Effect should be given to every clause in the contract, and if clause 85 has not this effect, it is difficult to give any force to it at all.

Finlay, Q.C., in reply.

Cur. adv. vult.

1888. July 2. The judgment of the Court (Cave and A. L. Smith, JJ.) was read by

CAVE, J. This is an application to set aside an award on the ground that the submission to arbitration was revoked before the award was made. At common law the submission could be revoked at any time before the award was made; but the 3 & 4 Wm. 4, c. 42, s. 39, provides that a submission to arbitration containing an agreement that such submission shall be made a

(1) 12 Q. B. D. 310. (2) 20 Q. B. D. 177.

rule of Court is not revocable without the leave of the Court; and the question for us is whether the submission in this case contains such an agreement. The 17th section of the Common Law Procedure Act, 1854, provides that every submission to arbitration by consent in writing may be made a rule of Court, unless the submission contains words purporting that the parties intend that it should not be made a rule of Court. The effect of this section was discussed in *Mills* v. *Bayley* (1), in which it was held that this section had not the effect of inserting in the agreement a clause empowering it to be made a rule of Court, or in other words that this statutory power was not the same thing in effect as an agreement that the submission should be made a rule of Court. This decision was followed by the Court of Common Pleas in *In re Rouse and Meier* (2), and by the Court of Appeal in *Fraser* v. *Ehrensperger* (3). In the case before us, however, the agreement contains a clause that, as far as the same were applicable and were not thereby varied, the provisions of the Common Law Procedure Act, 1854, should apply to the arbitration thereby agreed to. Now it seems to us that that clause has the effect of inserting in the agreement all the provisions of the Common Law Procedure Act, 1854, which are applicable to such a reference and are not varied by the agreement itself. Among the provisions so applicable is s. 17, enabling the agreement to be made a rule of Court unless it contain words purporting that the parties intend it should not be made a rule of Court. The parties, therefore, had power to exclude this clause; and, as they have not done so, but on the contrary have, as we think, expressed their intention that it should apply, there is in effect, according to our judgment, an agreement in this submission that the document should be made a rule of Court within the statute of William IV. For these reasons we are of opinion that the application should be refused with costs.

Application refused.

W. J. B.

The contractors appealed.

(1) 2 H. & C. 36. (2) Law Rep. 6 C. P. 212.
(3) 12 Q. B. D. 310.

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1888. July 25. *Finlay, Q.C.*, and *Reginald Brown*, for the appellants.

J. G. Wood (*Sir R. E. Webster, A.G.*, with him), for the respondent.

The same arguments were urged as in the court below.

Cur. adv. vult.

1888. July 30. LINDLEY, L.J. This is an appeal from a decision of the Divisional Court refusing an application to set aside an award upon the ground that the submission had been duly revoked, and the question raised is whether the appellants had power to revoke the submission. The answer to this question depends upon the conjoined effect of two sections of Acts of Parliament, and of a clause in the agreement made between the parties; the statutory enactments are 3 & 4 Wm. 4, c. 42, s. 39, and s. 17 of the Common Law Procedure Act, 1854; the clause in the agreement I will read presently. The Divisional Court held that by reason of the clause in the agreement the submission was not revocable, and the correctness of their decision depends upon the construction of these sections or clauses. It is plain that under the Act of William IV., if the document on its true construction contains an agreement that the submission *shall* be made a rule of Court, there is no power in the parties to revoke the submission; while if it amounts to something different, they will have such power. Several cases have been cited to us in argument, including *In re Rouse and Meier* (1), and *Thomson* v. *Anderson* (2), which shew that the mere fact that s. 17 of the Common Law Procedure Act, 1854, enables a submission to be made a rule of Court at the option of either party does not prevent a revocation of the submission. But it is clear that if the agreement between the parties stipulates that the submission *shall* be made a rule of Court, the case would be brought within s. 39 of the Act of William IV. Now clause 85 of the contract, upon which the present case turns, is as follows: "As far as the same are applicable and not hereby varied, the provisions of the Common Law Procedure Act, 1854, or any statutory modification

(1) Law Rep. 6 C. P. 212. (2) Law Rep. 9 Eq. 523.

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Lindley, L.J.

thereof for the time being in force with reference to the settlement of disputes by arbitration, shall apply to the arbitration agreed to in these presents." What does that mean? It was urged by Mr. Finlay that it really amounted to nothing at all, and that its whole effect was to call the attention of the parties to the fact that there were sections in the Act of 1854 which were applicable to their agreement to refer to arbitration. He urged an argument somewhat of this nature, though not in these words: "it is established that under the Act of 1854 a submission to arbitration is revocable; how then can it be irrevocable if there is a clause in the agreement that the Act shall apply?" That is an argument which is rather plausible than sound, and the proper answer to it is that by agreeing to make the provisions of the Common Law Procedure Act applicable the parties have brought the case within the Act of William IV., and that there is no substantial difference between an agreement that a submission shall be made a rule of Court and an agreement that it may be so made, if either party chooses. I have taken some pains to ascertain what are the usual forms of precedents relating to agreements to refer disputes to arbitration, and the conclusion I have come to is that the whole object of this clause is to comply with s. 39 of the Act of William IV., and that unless we hold it to have this operation we should be compelled to hold that the clause has no operation at all. On these grounds I am of opinion that the decision of the Divisional Court was correct.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Linklater & Co.*

Solicitors for respondent: *Sutton & Ommanney.*

W. J. B.

1888
Aug. 7.

TUTHER *v.* CARALAMPI.

Practice—Specially indorsed Writ—Bond—Penalty—Orders III., *r.* 6; XIII., *rr.* 3, 14; XIV., *r.* 1—8 & 9 *Wm.* 3, *c.* 11, *s.* 8.

The indorsement on a writ claimed 500*l.*, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 26*l.* during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid:—

Held, that the plaintiff was not entitled to proceed under Order XIV., r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Wm. 3, c. 11, s. 8, and Order XIII., r. 14.

APPEAL from a decision of Charles, J., at chambers, rescinding the order of a Master allowing the plaintiff to sign final judgment under Order XIV., r. 1.

The plaintiff's writ was thus indorsed:—

"Plaintiff's claim is for principal upon the defendant's bond to the plaintiff, dated the 28th day of September, 1887, and conditioned for the payment to the plaintiff of 26*l.* quarterly in advance, payable on the 25th day of March, 24th June, 29th September, and 25th December in every year during the life of Stephanie Tuther until she shall attain the age of sixteen years. Stephanie Tuther was born on the 5th of September, 1885, and is still living. Two quarterly payments of 6*l.* 10*s.* due on the 25th of March, 1888, and 24th of June, 1888, are due and unpaid.

"Particulars: Principal 500*l.*

The plaintiff claims 500*l.*"

The bond in question was under the defendant's seal for payment of 500*l.* to the plaintiff, Clara Tuther, her executors, administrators, and assigns, with the condition that if the defendant, his heirs, executors, or administrators, should pay to the said Clara Tuther, or to her solicitors or nominees, during the life of her child Stephanie Tuther, an annuity or yearly sum in advance of 26*l.* by four quarterly payments on the specified days in every year until the child attained the age of sixteen years, together with all costs and expenses attending the collection thereof, then the bond should be void, but otherwise that it should remain in full force.

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Charles, J., at chambers, refused to allow the plaintiff to sign final judgment under Order XIV., on the ground that the case was not one in which the writ could be specially indorsed under Order III., r. 6.

F. Laing, for the plaintiff. The plaintiff's claim is within Order III., r. 6, because it is in respect of a debt or liquidated demand in money payable by the defendant, and arising on a bond under seal for payment of a liquidated sum of money. She was therefore entitled to specially indorse her writ under that rule, and to have leave to sign final judgment, there being no defence, under Order XIV., r. 1. Before the statute 8 & 9 Wm. 3, c. 11, the plaintiff could have recovered the full penalty of 500*l.* at law, and the defendant could only have obtained relief by applying to the Court of Chancery for a stay of proceedings. The plaintiff could then obtain a writ for the assessment of damages by the sheriff in respect of the breaches. Sect. 8 of that statute enables the plaintiff in an action on a bond, or on any penal sum for non-performance of any agreement by deed, to assign breaches and to assess his damages and costs of suit in respect of such breaches, and to have judgment entered on the verdict; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or nil dicit, the plaintiff may suggest as many breaches as he thinks fit, and shall have a writ to the sheriff to summon a jury and assess damages. Then the defendant, after judgment entered on the verdict of the jury, may have a stay of execution on paying the damages and costs, but the judgment is to remain to answer any further breach, and the plaintiff may have a scire facias against the defendant on the judgment in respect of fresh breaches, or summon him to shew cause why execution should not be had upon the judgment in respect of the damages occasioned by such fresh breaches, which damages are to be ascertained in the same manner as before. The effect of those provisions was merely to simplify the procedure by making it unnecessary to go to the Court of Chancery. By Order XIII., r. 14, "where the writ is indorsed with a claim on a bond within 8 & 9 Wm. 3, c. 11, and the defendant fails to appear thereto, no statement of claim shall be delivered, and the plaintiff may at

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once suggest breaches by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the said statute, and in 3 & 4 Wm. 4, c. 42, s. 16." It is conceded that this is a claim indorsed on a bond within 8 & 9 Wm. 3, c. 11, but the plaintiff is not limited to the procedure provided by that statute and Order XIII., r. 14. That rule was meant to apply where the plaintiff has not specially indorsed his writ under Order III., r. 6, and where the defendant has not appeared. If the writ be specially indorsed under Order III., r. 6, then Order XIV., r. 1, applies.

Reginald Brown, for the defendant. A claim for sums due on a bond has always, in substance, been a claim for damages, and is so spoken of in 8 & 9 Wm. 3, c. 11. Order III., r. 6, and Order XIV., r. 1, therefore do not apply to such a case as this. If the plaintiff was allowed to sign judgment for the 500*l.*, he would still have to go to a jury and assess his damages in respect of the breaches, and he could only obtain execution in respect of the amount so assessed. The judgment, therefore, would not be final. Order XIII., r. 3, points out what the plaintiff may do in default of an appearance by the defendant to a writ indorsed for a liquidated demand, whether specially or otherwise, and rule 14 of the same order would be wholly unnecessary if Order III., r. 6, and Order XIV., r. 1, applied to writs indorsed with a claim on a bond.

F. Laing, replied.

LORD COLERIDGE, C.J. I think this is a plain case. It is clear to my mind that the provisions of 8 & 9 Wm. 3, c. 11, s. 8, constitute a special procedure which is intended to be saved by Order XIII., r. 14. That order, read with the statute, provides a complete code of procedure, and the provisions of the other rules and orders with respect to specially indorsed writs are therefore excluded from applying. It is clear also, I think, that you could not, under Order XIV., r. 1, get final judgment for the whole amount of the bond; and that is an additional reason for saying that Order XIV. was not intended to apply. I have come to the conclusion—with regret, for the merits of the case appear to be with the plaintiff—that the order of Charles, J., was right, and should be affirmed.

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HAWKINS, J. I am entirely of the same opinion. I cannot think that Order XIV. was intended to apply to a case like this, where it must be conceded that the plaintiff could not get a final judgment, to be followed by execution, for the whole sum of 500*l.*

Appeal dismissed.

Solicitor for plaintiff: *J. White Harrison.*
Solicitor for defendant: *C. A. Angier.*

W. A.

IN RE DOWSON. EX PARTE JAYNES.

July 2.

Bankruptcy—Scale of Costs where Assets do not exceed 300*l.*—*Taxation upon Lower Scale—Costs "payable out of the Estate"—Bankruptcy Rules*, 1886, *r.* 112, *sub-s.* 2.

By the Bankruptcy Rules, 1886, r. 112: (2) Subject to the provisions of No. 1 of the scale of costs, where the estimated assets of the debtor do not exceed the sum of 300*l.* a lower scale of solicitors' costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate.

The trustee having been ordered by the Court to pay the costs of unsuccessful proceedings under the Act with power to recover them out of the estate:—

Held, that such costs were not liable to be taxed upon the lower scale abovementioned.

THIS was a small bankruptcy in which the official receiver, as trustee, had obtained in the county court an order against one Jaynes to pay to him the sum of 21*l.* 0*s.* 11*d.* on the ground that it had been paid by the bankrupt by way of fraudulent preference.

On December 8, 1887, the decision of the county court was reversed on appeal, and the official receiver, as trustee, was ordered to pay the appellants' costs of the appeal and of the Court below; and it was further ordered that the official receiver, as trustee of the property of the bankrupt, should be at liberty to recoup himself out of the estate the costs so directed to be paid by him.

On the appellant's bill of costs coming before the taxing-master, the latter held that they were "costs payable out of the estate" within the meaning of r. 112 of the Bankruptcy Rules,

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1886 (1), and were therefore taxable on the lower scale. Against this decision Jaynes appealed.

Ringwood, for the appellant. The rule only applies to such costs as are payable to the solicitor of the trustee or of the debtor for proceedings under the Act, and does not apply to costs of proceedings against third parties: *In re Glanville* (2); *In re Angerstein* (3).

Muir Mackenzie, for the trustee. The fact that these costs are payable to a person outside the bankruptcy does not affect the question. They are costs of a proceeding under the Act and are payable out of the estate. The taxing-master followed the practice which has been adopted since the rule came into operation. Here the trustee was not expressly ordered to pay them "personally." If the appellant's contention is correct, the operation of the rule will be limited to cases in which the order directs the costs to be paid "out of the estate."

CAVE, J. I think the taxing-master has not put the right construction on r. 112. That rule was intended to apply to costs which, by the provisions of the Act, are directed to be paid out of the estate. Many examples of this kind are to be found in the scale of costs itself; and, wherever that is so, undoubtedly there the costs, which by the Act are to be paid out of the estate, are to be paid upon the lower scale. But I do not think that the rule was ever intended to apply to costs which are in the discretion of the Court, and which, in consequence of the Court exercising its discretion in one particular way, may come to be paid out of the estate. It would be, it seems to me, a monstrous injustice if the trustee might initiate legal proceedings against a third party in all these cases under s. 121,—because it must apply

(1) Bankruptcy Rules, 1886, r. 112: "(1.) The scale of costs set forth in the Appendix, and the regulations contained in such scale shall subject to these rules apply to the taxation and allowance of costs and charges in all proceedings under the Act and these rules. (2.) Subject to the provisions of No. 1 of the scale of costs where the estimated assets of the debtor do not exceed the sum of 300*l.* a lower scale of costs shall be allowed on all proceedings under the Act in which costs are payable out of the estate."

(2) 2 Mor. 71.

(3) Law Rep. 9 Ch. 479.

not only to cases where the official receiver is trustee, but where the trustee is appointed by the creditors in the place of the official receiver—with a comfortable feeling that if he wins he will get full costs, whilst if he loses he will only have to pay three-fifths. I cannot conceive that to be the meaning of the Act. There is another and a more simple and natural meaning to be attributed to it, and that is the meaning which I think it must bear. The case must go back to the master to review his taxation, with my direction that under the circumstances of this case he is to allow the appellant his full costs, and also—I do not suppose it will come before him, because he is only taxing as between the trustee and the appellant, but at all events—I express my opinion that, in such a case as this, the trustee, having paid the costs upon the full scale in accordance with the order of the Court, and being allowed by the order to recoup himself out of the estate, should be allowed to recoup himself what he has actually paid.

Appeal allowed.

Solicitors: *H. B. Roberts; W. Murton.*

H. L. F.

1883
April 10;
Aug. 9.

[IN THE COURT OF APPEAL.]

CREW *v.* CUMMINGS. WOOD, CLAIMANT.

Bill of Sale—Affidavit — Accidental Omission of Residence, &c., of attesting Witness—Rectification of Omission—"The Register"—Bills of Sale Act, 1878 (41 *& 42 Vict. c.* 31), *ss.* 10, 12, 14.

Sect. 14 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), enacts that a judge, on being satisfied that the omission to register a bill of sale, or the omission or misstatement of the name, residence, or occupation of any person, was accidental, or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, &c., as he thinks fit to direct:—

Held (affirming the judgment of the Queen's Bench Division) that the power of rectification given by the section is limited by the description of "register" in s. 12 of the Act, and therefore, where the affidavit filed with the registrar under s. 10, sub-s. 2, has by inadvertence omitted to describe the residence and occupation of an attesting witness, the judge has no power to allow a supplemental affidavit to be filed supplying such particulars.

The time for registration cannot be extended under the 14th section so as to defeat the vested right of an execution creditor.

APPEAL from the order of the Queen's Bench Division (1) setting aside an order made by Field, J., at chambers upon an interpleader issue to try the right to goods taken in execution by the plaintiff as execution creditor as against the claimant under a bill of sale. The order of the judge at chambers allowed the claimant to file a supplemental affidavit setting out the residence and occupation of one of the attesting witnesses to the bill of sale, which had been inadvertently omitted in the affidavit filed with the registrar at the time of its registration.

Bassett Hopkins, for the claimant. The judge at chambers had power to make the order which he made under s. 14 of the Bills of Sale Act, 1878.

[BOWEN, L.J. Is there any precedent for allowing, after the interpleader proceedings have begun, an amendment which will have the effect of altering the title to the goods?]

The judge could impose any terms he might think fit as a

(1) 20 Q. B. D. 535.

condition of the amendment so as to prevent injustice. The intention of the legislature in passing s. 14 was to prevent a mere inadvertent omission, which has not really misled or prejudiced any person, from affecting the substantial rights of the parties. The provision for amendment would really have very little effect unless it could operate retrospectively, because it is only when the dispute arises that the technical flaws are discovered. It is entirely a matter within the judge's discretion whether the amendment shall be allowed, and if so, on what terms; so that it is only in cases where the creditors are not really prejudiced, but are seeking to take advantage of some trifling and immaterial slip or omission, that the order would be made. The learned judge at chambers thought that the defect here was merely technical, and imposed no terms on the claimant as a condition of the amendment. It is submitted that the terms of the 14th section permit of an amendment of the registration by filing a supplemental affidavit of the residence and occupation of the attesting witness. The power would be of little value if confined to amendment of the registrar's book.

[LORD ESHER, M.R. The judgment below does not appear to deal with the question whether the judge could not under the section extend the time for registration, and then allow the filing of a fresh affidavit.]

He cited *In re Bills of Sale Act* (1).

Kisch, for the execution creditor. The judge had no power to make the order which he made. The 14th section contemplates two cases, one being a total omission of registration, the other a defective registration; and provides in the one case that the time for registration may be extended, and in the other for the insertion in the register of what has been omitted; but it does not provide for an amendment by filing a supplemental affidavit where the affidavit filed on registration was insufficient.

[LORD ESHER, M.R. It would seem to be rather an extraordinary result that where there is no registration at all the time may be extended, but where the registration is merely defective it cannot be extended.]

Sect. 12 defines the register to be the book kept by the

(1) 3 Times Law Rep. 539.

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registrar. The term "any person" in s. 14 must be limited by reference to the form of register given in the schedule, which only provides for the insertion of the name, residence, and occupation of the party giving the bill of sale, and not of those of the attesting witness or witnesses.

Secondly, the execution creditor has a vested right by virtue of s. 8 of the Bills of Sale Act, 1882. The object of s. 14 was the remedying of defects with reference to the future only; and the provision ought not to be construed so as to defeat vested rights.

Thirdly, if an amendment is now to be allowed, it ought to be subject to a reservation of the rights of the execution creditor. The execution creditor has been put to costs, and the issue has now been sent down to the county court, and is shortly coming on for trial. The claimant only became assignee of the bill of sale three days after the execution.

Bassett Hopkins, in reply.

Cur. adv. vult.

1888. Aug. 9. BOWEN, L.J. The Master of the Rolls has asked me to express my opinion first in this case. This is an appeal from an order of the Divisional Court setting aside an order made by Field, J., at chambers upon interpleader proceedings. Certain goods having been taken in execution under a judgment, they were claimed by the claimant under a bill of sale. The Bills of Sale Act, 1878, provides that for the purposes of the registration of a bill of sale it shall be necessary to file an affidavit giving a description of the residence and occupation of every attesting witness to such bill of sale. The description of the residence and occupation of one of the attesting witnesses to this bill of sale was inadvertently omitted. To cure this evident slip, Field, J., made an order, which purported to be made under the 14th section of the Act of 1878, allowing the claimant to file a supplemental affidavit setting out the residence and occupation of the attesting witness on the ground that such description had been inadvertently omitted. Against this order there was an appeal, which the Divisional Court reluctantly allowed on the ground that s. 14 only provides for a rectification of the register, and that the order of

Field, J., did not provide for a rectification of the register. The Court held that the register was defined by s. 12 and meant the book which by the Act has to be kept by the registrar for the entry of certain particulars, and accordingly they reversed the decision of Field, J. I agree with the view taken by the Divisional Court of the first part of s. 14 and do not think that the order of Field, J., was an order for the rectification of the register. But on the appeal before us a further point was taken, viz., that the Court might under the succeeding part of the section at the eleventh hour extend the time for registration of the bill of sale. I feel that this is a hard case, and should be disposed, if possible, to aid the claimant, but I do not think that the Act of Parliament in giving the power to extend the time could have intended that such an extension of time should be granted after the title to the goods had actually vested in the execution creditor by reason of the failure of the holder of the bill of sale to comply with the provisions of the Act. Under the provisions of s. 8 of the Act of 1882, in consequence of the omission to comply with the requirements of the Act, the title to the goods had vested in the execution creditor who had seized, and I do not think that it could have been intended to give a discretion to extend the time for registration so as to defeat a title actually vested in a person who has acted with perfect bona fides. The matter may be looked at in two ways. Either it may be considered that the true construction of the Act is that there is no jurisdiction to extend the time in such a case, or, looking at the matter from a slightly different point of view, it may be said that the discretion ought not to be exercised in order to defeat a title already vested. For these reasons I think the appeal should be dismissed.

LORD ESHER, M.R., concurred.

Appeal dismissed.

Solicitor for execution creditor: *J. S. Rubinstein.*

Solicitor for claimant: *Buckler.*

E. L.

1888
Aug. 7.

[IN THE COURT OF APPEAL.]

McGREGOR *v.* McGREGOR.

Husband and Wife—Agreement for Separation—Power of Husband and Wife to contract without the Intervention of Trustee—Agreement not to be performed within a Year—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A husband and wife, having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children, and to indemnify the husband against any debts contracted by her. An action having been brought in the county court by the wife against the husband for six weeks arrears of maintenance under the agreement:—

Held (affirming the decision of the Queen's Bench Division), that the husband and wife had power to make a contract for separation without the intervention of a trustee, by way of compromise of legal proceedings, that the husband's contract to pay the wife a weekly sum for maintenance was binding, and that the action was maintainable:

Held, also, that the agreement was not an agreement "not to be performed within one year" within the 4th section of the Statute of Frauds, and therefore need not be in writing.

Davey v. *Shannon* (4 Ex. D. 81) not followed.

APPEAL from the judgment of the Queen's Bench Division upon an appeal from the County Court of Newcastle-on-Tyne (reported 20 Q. B. D. 529).

The facts are fully set forth in the judgment in the court below, and for the purposes of this report may be briefly stated as follows:—

The plaintiff and defendant, who were wife and husband, took out cross-summonses against each other for assault, but, before the hearing, an oral agreement was entered into by them by which the summonses were to be withdrawn and the plaintiff and defendant were to live separate, the defendant, the husband, agreeing to pay the plaintiff, the wife, 1*l.* a week for maintenance, and the plaintiff agreeing to maintain herself and her children and to indemnify the defendant against any debts contracted by her. The summonses were accordingly withdrawn, and the parties thenceforward lived separate. The defendant having failed to pay the weekly allowance, the plaintiff sued him for six weeks' arrears thereof. The county court judge gave judgment

for the plaintiff. The Queen's Bench Division on appeal affirmed his decision.

J. Lawson Walton, for the defendant. In this case there is no intervention of a trustee for the wife, and, subject to certain equitable exceptions, within none of which this case comes, the general doctrine of law is that a husband and a wife cannot contract with each other, a married woman not having the capacity for making a contract. In certain matters a wife is necessarily considered as having personal rights independent of her husband, and so far may be in the position of a feme sole. This is necessarily the case with regard to the conduct of a matrimonial suit, in the case of which a wife may make a binding compromise. But it is contended that this exception to the general rule is confined to the case of a matrimonial suit: in all other cases in which an agreement for separation has been held binding there was a trustee for the wife.

[LINDLEY, L.J. Why should not the same principle apply wherever there is a matter between husband and wife as to which the wife can take legal proceedings, e.g. when she takes out a summons for assault?]

In any case there can only be a compromise in relation to the wife's interest involved in the suit or proceedings; she could not agree as to the custody and maintenance of children by way of compromise of a summons for assault. There is no valid consideration moving from the wife for such an agreement as this, as she cannot bind herself.

[LORD ESHER, M.R. If a husband has done something which would be ground for a matrimonial suit why may they not make a valid compromise by agreeing to live apart on terms, though a suit has not actually been commenced?]

It is only in the character of litigants that they get a capacity to contract with each other. The agreement by the wife to maintain herself and the children was invalid, and therefore part of the consideration for the husband's promise fails. In the absence of a trustee there is no consideration to support the promise by the husband, because the wife cannot make a valid or binding agreement to live separate.

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[He cited on this point Story's Equity Jurisprudence, s. 1428, *Legard* v. *Johnson* (1), *Vansittart* v. *Vansittart* (2), *Hunt* v. *Hunt* (3), *Besant* v. *Wood* (4), and *Wilson* v. *Wilson.* (5)]

Secondly, no action can be maintained on this agreement, because it was not in writing, and it is an agreement not to be performed within one year of the making thereof within s. 4 of the Statute of Frauds: *Davey* v. *Shannon* (6); *Eley* v. *Positive Life Assurance Co.* (7)

Stuart Sim, for the plaintiff, cited *Rowley* v. *Rowley* (8) on the first point and *Murphy* v. *Sullivan* (9) on the second. He was not called on to argue.

LORD ESHER, M.R. In this case the action is brought to recover six weeks' arrears of maintenance contracted to be paid by the husband to the wife. The husband and wife had taken out cross summonses for assault before a magistrate, and, such summonses having been taken out, there was an oral agreement between the husband and wife to live separate, the husband agreeing to pay the wife 1*l.* a week by way of maintenance, and she agreeing to maintain herself and their children. Thereupon they did separate, and have lived separate ever since, and the wife has during the period covered by the arrears maintained herself and the children; but the husband now seeks to repudiate the bargain, and says that he is not bound to pay the wife the arrears already due, or to pay in future under the agreement. Two points are taken on his behalf: the first being that he is not bound, because the agreement is between husband and wife, quite independently of the question whether the agreement is or is not in writing; the second being that, assuming that the agreement might have been binding if in writing, the wife cannot maintain the action, because the agreement was oral, and the 4th section of the Statute of Frauds applies. With regard to the first point, circumstances were alleged by the wife to have taken place such as would have afforded ground for a claim by

(1) 3 Ves. 352.
(2) 4 K. & J. 62.
(3) 4 D. F. & J. 221.
(4) 12 Ch. D. 605.
(5) 1 H. L. C. 538.
(6) 4 Ex. D. 81.
(7) 1 Ex. D. 20.
(8) Law Rep. 1 H. L., Sc. 63.
(9) 11 Ir. Jur. (N.S.) 111.

the wife, if she chose to make one, for a judicial separation; for it was alleged by the wife that the husband had been guilty of such assaults on her as would be ground for such a separation; and also the circumstances alleged were such that the wife could, in her own right and for her own personal security, have summoned her husband for assaulting her. Therefore, as regards what she alleged to have been done to her by her husband, she had independent rights, and could in her own right have maintained two kinds of legal process. Under such circumstances, the question arises whether, when a wife is bonâ fide setting up such rights, she can or cannot make a binding compromise with the husband with regard to them. If a feme sole proceeded for an assault of the nature alleged here, it appears that, being a misdemeanor, she could compromise it; and it seems to me that as regards proceedings for assault a wife is really in the same position in this respect as a feme sole. With regard to a claim for judicial separation, it is admitted that, if a suit in the Divorce Court has been begun, then, before proof of the allegations made by the wife, she can compromise the suit, and such compromise would be binding on the husband; but it is contended that she cannot do so before commencing the suit. I do not think that the distinction between those periods of time is one which the law ought to recognise. It seems clear that it is not necessary before they can compromise that they should go into and expose the facts, and, if it is meant that they must go through the formality of issuing a piece of paper before they can compromise, I think that would be a mere technicality which cannot be requisite in law. If they can compromise immediately after commencing proceedings, I think they can before, where there is a bonâ fide complaint by one against the other, and a bonâ fide ground for the litigation, and I cannot think that the mere form of issuing a piece of paper is necessary to give validity to the compromise. With regard to the proceedings for assault the point does not arise, because the summons had already been issued, and then there was a compromise in respect of such proceedings. Then the question arises, whether there was a consideration to support the agreement. I think there was the consideration of the withdrawal of the summons at the request of the husband, he undertaking to perform what

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is specified in the agreement. Accordingly the wife did in fact withdraw the summons, and therefore there was an executed consideration. It was contended that the intervention of a trustee was necessary in order to make such a contract binding on the husband; but, as my brother Lindley has pointed out, though it has been considered necessary in some cases to have a trustee in order to get a consideration, by means of his covenant to indemnify the husband, for an agreement that husband and wife should live separate, on the ground that mere executory promises as between husband and wife do not afford a sufficient consideration, that necessity does not arise in a case like this, where there is an executed consideration.

Then it was argued that the agreement was invalidated, because part of the consideration was the promise by the wife to maintain the children. I cannot think that, where the wife has executed the real consideration, viz., the withdrawing of the summons, the fact that there is the further promise to maintain the children, which she has also performed, can invalidate the promise on the part of the husband. Whether the husband could or could not maintain an action, if the wife did not perform the promise to maintain the children, is another matter, but it does not arise here. I do not see how that promise can invalidate the promise made by the husband on a consideration executed by the wife. With regard to the question of the capacity of the wife to sue on such an agreement as this, it seems to me that the Married Women's Property Act, 1882, would certainly enable her to sue, assuming it to be necessary, which I do not say that it is, to have resort to its provisions for the purpose of establishing her right to sue.

Then with regard to the question whether the Statute of Frauds applies, a case was cited for the defendant which I confess somewhat startled me. I mean the case of *Davey* v. *Shannon*. (1) Hawkins, J., seems in that case to have thought that an agreement is within the statute although performance may take place within the year, if at the time when the agreement was entered into the parties contemplated that it could or might have to be performed beyond the year. I confess that notion startled me.

(1) 4 Ex. D. 81.

I think the true doctrine on the subject is that which was laid down by Tindal, C.J., in *Souch* v. *Strawbridge* (1), where he said: "It (the statute) speaks of 'any agreement that is not to be performed within the space of one year from the making thereof,' pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell* v. *Drummond* (2), the rule to be extracted from which is, that, where the agreement distinctly shews, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute: but that where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply." The other judges, viz., Coltman, Cresswell, and Erle, JJ., all assented to the doctrine so laid down. I confess I thought that the doctrine so expressed was that which was generally held on the subject. We have been referred to a case decided in the Irish Court of Exchequer Chamber, viz., *Murphy* v. *Sullivan*. (3) Of course that is not an authority binding upon us, but it is a decision to be regarded with great respect, and one which, if it follows, as I think it does, the doctrine laid down by Tindal, C.J., in *Souch* v. *Strawbridge* (1), we should not hesitate to agree with and to act upon. It was decided in that case that a contract to maintain a child for life need not be in writing. The judgment in that case seems to be precisely in accordance with the doctrine laid down in *Souch* v. *Strawbridge* (1), which again was founded on the judgment in *Boydell* v. *Drummond* (2), and has always been accepted as the correct doctrine on the subject. If I understand it rightly, the decision in the case of *Davey* v. *Shannon* (4) departs from that doctrine and appears to be inconsistent with what we are now deciding. In my opinion this case is not within the Statute of Frauds. For these reasons I think the appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion on both the points that have been raised. The plaintiff and defendant had taken

(1) 2 C. B. 808.
(2) 11 East, 142.
(3) 11 Ir. Jur. (N.S.) 111.
(4) 4 Ex. D. 81.

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out cross-summonses for assault, and thereupon an agreement was entered into between them, the effect of which the county court judge finds to be that the plaintiff and defendant should live separate and apart, that the defendant should pay to the plaintiff 1*l.* per week, and the plaintiff should therewith maintain herself and her three children, that she should indemnify her husband against any debts contracted by her, and that the summonses should be withdrawn. In pursuance of that agreement the summonses were withdrawn and the parties did live apart; the wife has maintained herself and the children, and I assume that the husband has never been sued for any debts contracted by her, but he declines to pay the 1*l.* a week, and she sues him for six weeks' arrears under the agreement. The grounds on which he relies are, first, that such an agreement between husband and wife has no validity. The law on the subject of such agreements has unquestionably gone through considerable modification during the last twenty or thirty years. There was a time when an agreement for a separation between husband and wife was considered contrary to public policy. That opinion was rendered untenable by the decision of the House of Lords in *Wilson* v. *Wilson* (1), and since that decision it is clear that such an agreement cannot be said to be against public policy. It was said, again, that the wife had no capacity to make such a contract; but with regard to that question, again, the current of authority in the modern cases has not flowed quite in the same direction as it did in the ancient. The doctrine of the wife's incapacity to contract is subject to the qualification that the husband and wife may bind themselves by an agreement to compromise certain proceedings which they may take against each other. It is true that the decisions on the subject have gone no further than matrimonial suits, but I do not see any reason for confining the principle to matrimonial suits. It seems to me logically to extend to all proceedings which the husband and wife are by law capable of taking against each other. The present case seems to me to fall within the exception to the general rule as to the incapacity of the husband and wife to contract with each other, apart from the provisions of the Married Women's

(1) 1 H. L. C. 538.

Property Act. Therefore, I think that this agreement cannot be void on the ground of want of capacity on the part of the husband and wife to contract, but falls within the exception to such want of capacity. It was argued that it was void for want of consideration, but it seems to me that there was a consideration apart from the agreement of the wife to maintain the children, viz., the withdrawal of the summons. Then it was argued that the agreement could not be binding because there was no trustee interposed. It is necessary to consider what was the object of the interposition of a trustee in such cases. The trustee was interposed for the purpose of supplying a consideration when otherwise there would have been none. The notion was that the contract between husband and wife being primâ facie void, the trustee was introduced in order that his covenant to indemnify the husband might afford a consideration for the husband's promise. But where there is a valid consideration as between husband and wife there is no need of a trustee. It seems to me that the view we are taking of this case is quite consistent with the decision in *Besant* v. *Wood* (1) and *Rowley* v. *Rowley*. (2) For these reasons I think that this agreement was perfectly valid. I do not know whether it could be enforced against the wife so far as the maintenance of the children is concerned, but I do not think it is necessary to consider that point, because in this case she has maintained the children, and therefore no question arises with regard to that.

With regard to the question whether the Statute of Frauds applies, it appears to me that the case falls within the doctrine laid down by the Exchequer Chamber in Ireland in the case of *Murphy* v. *Sullivan* (3) which is in accordance with previous cases. If this point had now to be considered for the first time, I think the question might present some difficulty, but we are not at liberty to consider it as res integra. The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply. With regard to the decision in *Davey* v. *Shannon* (4)

(1) 12 Ch. D. 605.
(2) Law Rep. 1 H. L., Sc. 63.
(3) 11 Ir. Jur. (N.S.) 111.
(4) 4 Ex. D. 81.

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I doubt whether it can be supported; it appears to me to be contrary to previous decisions. I prefer to put my decision on this point on the ground that the case is not within the Statute of Frauds. I feel some difficulty in saying that, when the consideration is partially executed, the case is taken out of the Statute of Frauds. As I understand the case of *Knowlman* v. *Bluett* (1) I must say I do not at present see how this case can be distinguished from it, but I prefer to put my decision on the ground that the Statute of Frauds is altogether inapplicable.

BOWEN, L.J. I am of the same opinion. The first point is as to whether such a contract as this between husband and wife can be binding, quite apart from the point under the Statute of Frauds. It is now settled law that an agreement by husband and wife to live apart is not contrary to public policy. It is also, I think, established law that such an agreement to live separate between husband and wife is good and valid, and binding on the parties, assuming a consideration to be shewn; which appears to me to be the case, where there has been such a matrimonial dispute as this, and an agreement by the parties to live apart arising out of and by way of compromise of such dispute. It seems to me that the view taken by the late Master of the Rolls in *Besant* v. *Wood* (2) is one which we ought to follow, and which is consistent with other authorities on the subject. If so, the only question is whether such an agreement is valid without the intervention of a trustee, but, assuming that the husband and wife can validly make such a contract, I do not see the necessity for the intervention of a trustee. However that might be otherwise, it seems to me clear that the provisions of the Married Women's Property Act give power to make such a contract without the intervention of a trustee.

With regard to the question upon the Statute of Frauds. There has been a decision which for 200 years has been accepted as the leading case on the subject. In *Peter* v. *Compton* (3) it was held that "an agreement that is not to be performed within the space of one year from the making thereof" means in the

(1) Law Rep. 9 Ex. 307. (2) 12 Ch. D. 605.
(3) Skin. 353.

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Statute of Frauds an agreement which appears from its terms to be incapable of performance within the year. In accordance with that doctrine it was decided in the case of *Wells* v. *Horton* (1) that a contract by A. that his executor should pay £10,000 need not be in writing, and in *Murphy* v. *Sullivan* (2) the Exchequer Chamber in Ireland held that a contract to maintain a child for life was not within the statute, because it might determine within the year. So far as *Davey* v. *Shannon* (3) departs from that view, it appears to me to be contrary to the current of authority. Whether this view was originally sound or not, it is too late to depart from it now. I prefer to put my decision on this view than on the decision in *Knowlman* v. *Bluett* (4), because I find some little difficulty in understanding the exact effect of that decision, and should like to consider it a little further before expressing an opinion with regard to it. It seems to me that there is ample ground for our present decision apart from that case. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Pyke & Parrott, for Joel & Pearson.*
Solicitors for defendant: *Williamson, Hill & Co., for Whitehorn.*

E. L.

THE QUEEN *v.* SLADE.

Aug. 9.

Metropolis—Police Acts—Police Magistrate—Jurisdiction—Order for delivery of Goods—Dog—2 & 3 Vict. c. 71, *s.* 40.

A dog is "goods" within the meaning of 2 & 3 Vict. c. 71, s. 40, and therefore a Metropolitan Police Magistrate has jurisdiction under that section to order a dog to be delivered to its owner.

A RULE nisi had been obtained by a person named Yeoward for a mandamus to direct Wyndham Slade, Esq., one of the Metropolitan Police Magistrates, to issue a summons and exercise

(1) 4 Bing. 40.
(2) 11 Ir. Jur. (N.S.) 111.
(3) 4 Ex. D. 81.
(4) Law Rep. 9 Ex. 307.

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jurisdiction under 2 & 3 Vict. c. 71, s. 40 (1), on the application of Yeoward for an order for the delivery of a dog.

From the affidavit of the applicant it appeared that he bought the dog on April 21, 1888, and lost it on July 18; that on July 21 a man named Manners came to Yeoward with the collar which the dog had been wearing when it was lost, and gave the collar to Yeoward, saying that he had the dog, and intended to keep it, as he had lost it some months before.

Yeoward then applied for a summons against Manners for the detention of the dog, which the Magistrate refused to grant, on the ground that a dog did not come within the description of "goods" in the section (2 & 3 Vict. c. 71, s. 40).

Mead, shewed cause. The Magistrate was right in holding that he had no jurisdiction, for a dog is not "goods" within the meaning of 2 & 3 Vict. c. 71, s. 40. If it had been intended to include dogs some word of larger meaning, such as "thing" or "property," would have been used, as in s. 24 of the same Act, and in 2 & 3 Vict. c. 47, s. 62.

[HAWKINS, J.:—Could an innkeeper sell a dog under the Innkeepers Act, 1878 (41 & 42 Vict. c. 38)?]

No; for a dog is not "goods" or "chattels," and in that Act a horse is expressly mentioned.

[HAWKINS, J.:—Surely under a bequest of "all my worldly goods" a dog would pass to the legatee.]

This statute creates a special jurisdiction, and should be construed strictly. The applicant has his remedy in the County Court.

[MANISTY, J. In *Bartholomew* v. *Freeman* (2) a horse was

(1) By 2 & 3 Vict. c. 71, s. 40: "Upon complaint made to any of the said magistrates by any person claiming to be entitled to the property or possession of any goods which are detained by any other person within the limits of the metropolitan police district, the value of which shall not be greater than 15*l*. . . . . it shall be lawful for such magistrate to summon the person complained of and to inquire into the title thereto, or to the possession thereof, and if it shall appear to the magistrate that such goods have been detained without just cause, after due notice of the claim made by the person complaining . . . . it shall be lawful for such magistrate to order the goods to be delivered to the owner thereof. . . ."

(2) 3 C. P. D. 316.

treated as "goods" within the meaning of the Rules of the Supreme Court, 1875, Order LII., rule 2, and a goat appears to be "goods" within the meaning of the section now in question: *Dover* v. *Child.* (1)]

Both those animals are the subject of larceny at common law, whereas a dog is not. In *Reg.* v. *Robinson* (2) it was held that there could not be a conviction for obtaining a dog by false pretences. That was on the ground that a dog was not a "chattel" within the meaning of 7 & 8 Geo. 4, c. 29, s. 53, and "chattels" are synonymous with goods.

Colam, was not called upon to support the rule.

MANISTY, J. I am of opinion that if we put a fair and reasonable construction on the statute there can be no doubt that the word "goods" in 2 & 3 Vict. c. 71, s. 40, includes a dog, and I think no better illustration can be given than that suggested by my brother Hawkins in the course of the argument, namely, the case of a will containing the words, "I give and bequeath all my worldly goods" to some person named in the will. It is clear that under these words a dog would pass to the legatee, but the contention in shewing cause against the rule leads to this conclusion, that, although the legatee would be entitled to the dog under the will, yet if a stranger got possession of it, and the legatee applied to a Magistrate for an order for its delivery, he would be met with the answer that he could not have an order, on the ground that the very same dog to which he had become entitled as goods under the will was not goods within the meaning of the Act. That would be an extremely narrow, and in my opinion an erroneous construction. The rule for a mandamus must go.

HAWKINS, J., concurred.

Rule absolute.

Solicitors for the applicant: *S. M. & J. B. Benson.*
Solicitor for the Magistrate: *The Solicitor to the Treasury.*

(1) 1 Ex. D. 172. (2) Bell C. C. 34.

P. B. H.

1888
July 4.

NEEDHAM *v.* BOWERS.

Revenue—Income Tax—Inhabited House Duty—Exemptions—"Hospital"—Self-supporting Institution for Insane—5 & 6 Vict. c. 35, s. 61, rule No. VI.; 48 Geo. 3, c. 55, Sched. B., Case IV.

By 5 & 6 Vict. c. 35, s. 61, rule No. VI., allowances in respect of property tax levied under Sched. A. of the Income Tax Acts are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse in respect of the public buildings . . . and for the repairs of such hospital, public school, or almshouse . . . and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and maintained by the funds of such hospital, school, or almshouse . . . Or on the rents and profits of lands," &c., "belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes."

By 48 Geo. 3, c. 55, Sched. B., Exemptions, Case IV.: "Any hospital, charity school, or house provided for the reception or relief of poor persons" is exempt from the inhabited house duty.

An institution for the reception of insane persons was founded by charitable donations, but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some less than the cost of their maintenance, and a few were maintained gratuitously. After paying expenses there was an annual surplus of profits which was expended in enlarging and improving the institution:—

Held, that the institution being wholly self-supporting was not exempt as a "hospital" within the meaning of either 5 & 6 Vict. c. 35, s. 61, rule No. VI., or 48 Geo. 3, c. 55, Sched. B., Case IV., which must be restricted to hospitals maintained wholly or in part by charity.

Cases stated by Commissioners of Income Tax on appeal by the superintendent of a hospital for the treatment of mental disease, known as Barnwood House Institution, at Barnwood, near Gloucester, against:

1. Assessments under Sched. A. on the house, pleasure grounds, and buildings used and enjoyed as part of the institution for the purposes thereof.

2. An assessment of 548*l.* on the institution and certain other buildings detached from but occupied with and as part of the institution, as the annual value for the purpose of inhabited house duty.

3. The surcharge of 4931*l.* under Sched. D. upon the institution for profits of keeping a lunatic asylum.

The hospital was established under the auspices of the governors of the General County Infirmary at Gloucester, who resolved on September 14, 1793:—

1. That a general hospital for the reception of insane persons should be established.

2. That the president, vice-presidents, and governors of the Gloucester Infirmary, with every well-wisher of such an institution, be requested to solicit contributions for the erection of such a hospital, and that all persons willing to favour the design be desired to signify their intentions as early as possible to Messrs. Turner & Sons, bankers, Gloucester.

3. That the means of supporting the expenses of the house by particular payments from the patients admitted therein, as adopted by the York and other hospitals on a similar foundation, have the approbation of this board.

4. That the institution will be rendered less expensive to the objects of the intended establishment, as well as more beneficial to the public, in proportion to the number of patients who can be accommodated in the building proposed to be erected.

Consequent on this appeal funds were obtained which provided a hospital for the care and treatment of the insane, at first in conjunction with the General County Asylum of Gloucestershire, but afterwards (1856), on the dissolution of partnership between the subscribers and the county authorities, at Barnwood, near the city of Gloucester.

The hospital was registered under 8 & 9 Vict. c. 100, and existed and was governed under rules and regulations which had received the consent of the Lunacy Commissioners and the Home Secretary under 16 & 17 Vict. c. 96. These rules described the objects of the institution to be as follows:—

1. Objects of the Institution.

That the institution shall be for the reception of two classes of insane patients, viz.:—

First.—Patients in more or less affluent circumstances, who shall contribute, according to the accommodation required, such sum as may be agreed upon.

Second.—Patients in limited circumstances, but in a position

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of life to render them unsuitable for admission into county asylums, who shall be received at such reduced rates of payment as the committee upon consideration of the circumstances of each case may determine, and some even gratuitously, preference being given to recent and curable cases, to which the gratuitous patients are to be wholly confined.

The estate and funds of the institution were vested in trustees, but the institution was directed and managed by a general committee appointed by the governors, who were defined to be donors of 50*l.* and upwards to the institution.

The services of the general committee and of the governors were entirely gratuitous. The institution was maintained almost exclusively from the receipts for the patients, some of whom, owing to their circumstances and ability, paid larger sums than were necessary to cover the actual cost of their maintenance and treatment in the institution. There was no endowment fund, nor were donations or annual subscriptions solicited—in fact, in the last three years only 15*l.* was received in this form.

From this excess, aided by the unincumbered ownership of suitable buildings, pleasure grounds, and premises, the general committee had been able to dispense considerable charity in the admission, care, and treatment of patients, either gratuitously or at sums considerably below their cost to the institution.

There was no classification of patients admitted to the institution, except on grounds of mental condition, and subject to this qualification all patients, whether remunerative or not, had the same food, accommodation and treatment.

It appeared that the average cost per patient during residence in the institution was about 2*l.* per head per week, and that there were 158 patients in the institution, of whom 66 were maintained and treated at less than cost price. Of the latter, 10 were treated, maintained, and clothed gratuitously, and the remaining 56 paid sums according to their means, at in all cases less than their cost to the hospital.

Of the 158 patients, 105 were gratuitously received or paid sums not exceeding two guineas a week.

After paying the working expenses, including this charitable

maintenance, the receipts of the general committee had been sufficiently large to make an annual surplus, which for many years past had been expended in enlarging, improving, and otherwise better adapting the institution for its work.

No profit or pecuniary advantage could be received or accrue to the trustees, the general committee, or governors of the institution, and the whole of any surplus which accrued upon the working of the institution must either accumulate for future charitable use, or be expended in the better adaptation of the buildings and premises to the curative treatment carried on.

The question for the Court in the first case was whether the institution was a hospital entitled to exemption from the duties charged under Schedule A. of the Income Tax Acts; in the second case, whether it was liable to pay inhabited house duty; and in the third case, whether it was entitled to exemption from payment of duties under Schedule D. of the Income Tax Acts.

Sir Horace Davey, Q.C., and *A. T. Lawrence*, for the appellant. The buildings and land of the asylum were obtained by charitable subscription, and although a profit is made it is not taken by the proprietors, but is immediately applied for the increase of the accommodation and comfort of patients. It is true there are no endowments, but the payments made by the richer patients help to maintain those who are poor. The asylum is a "hospital" within the ordinary meaning of the word, viz., a place for the reception of the sick or the support of the poor. First, it is a hospital within the exception in the Income Tax Act: 5 & 6 Vict. c. 35, s. 61, Schedule A., No. VI., of any "hospital, public school, or almshouse;" and it comes within a definition to be found in the interpretation clause of the Lunacy Regulation Act, 8 & 9 Vict. c. 100, s. 114, viz.: "'Hospital' shall mean any hospital or part of an hospital or other house or institution (not being an asylum) wherein lunatics are received, and supported wholly or in part by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients for or towards the support, provision, or benefit of other patients." It is not necessary that the institution should be

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wholly supported by charity. It has been decided that the words "public school" which follow "hospital" in 5 & 6 Vict. c. 35, s. 61, Schedule A., No. VI., are not limited to public schools maintained wholly by charity, but apply to a public school maintained partly by charitable endowments and partly by fees charged for instruction: *Blake* v. *Mayor and Citizens of the City of London* (1), and Denman, J., in that case said (2): "a hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefit of the hospital." Secondly, this institution is exempt from inhabited house duty, within the meaning of the words in 48 Geo. 3, c. 55, Schedule B. Exemptions, Case IV., "Any hospital, charity school, or house provided for the reception or relief of poor persons." The asylum is a "hospital" within the meaning of the Act. The words "provided for the reception or relief of poor persons" relate only to the last preceding word "house." They are inapplicable to a charity school.

The third case is governed by *St. Andrew's Hospital, Northampton* v. *Shearsmith* (3), and therefore it is conceded that the respondent is entitled to judgment.

Sir E. Clarke, S.G. (*Dicey* with him), for the respondent. The words "provided for the reception or relief of poor persons" in 48 Geo. 3, Schedule B., Case IV., may apply both to a "hospital" and "charity school" as well as to a "house," and ought to be so applied. They shew that the exception is limited to charitable institutions. The clause also throws light on the construction of 5 & 6 Vict. c. 35, s. 61, No. VI. It is fallacious to suggest that the test is whether this institution is a hospital without regard to charitable purposes. The appellant has conceded that the profits of the institution are assessable because not applied to charitable purposes only. It is clear also that if the trustees had any stock, that also would be liable if not so applied: s. 58. The exemption of rents and profits "in so far as the same are applied to charitable purposes," shews that a hospital to be exempt must have in it the elements of a charitable institution. So likewise does the following provision that the last-mentioned allowance is to be

(1) 18 Q. B. D. 437; 19 Q. B. D. 79. (2) At p. 445.
(3) 19 Q. B. D. 624.

claimed and proved by any agent "acting for such school, hospital, or almshouse, or other trust, for charitable purposes."

In *Blake* v. *Mayor and Citizens of the City of London* (1) there was a perpetual obligation imposed by statute to conduct the school in a particular way.

A. T. Lawrence, in reply. The limitation to "charitable purposes" in s. 105 shews that when the legislature intended the exemption to be so limited they used express words. But "charitable purposes" are not mentioned in 5 & 6 Vict. c. 35, s. 61, No. VI., with reference to hospital buildings.

Cur. adv. vult.

1888. July 4. The judgment of the Court (Huddleston, B., and Charles, J.) was read by—

CHARLES, J. In this case we have come to the conclusion that Barnwood House Institution is not a "hospital" within the meaning of 5 & 6 Vict. c. 35, s. 61, Rule No. VI. That rule makes allowances for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse . . . and for the repairs of such hospital, public school, or almshouse, and offices belonging thereto, and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and maintained by the funds of such hospital, school, or almshouse . . . .: or on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes. The said last-mentioned allowances to be granted on proof before the Commissioners for Special Purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only." Now if the word "hospital" is used here in its widest sense as a place appropriated to the reception of persons sick or infirm in body or in mind, or in the sense in which it is used in 8 & 9 Vict. c. 100, Barnwood House would come within the exemption clause.

(1) 18 Q. B. D. 437; 19 Q. B. D. 79.

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Charles, J.

But we think the language in the Income Tax Act must be restricted to hospitals supported wholly or in part by charity, and that it does not apply to a hospital which is self-supporting, and which, indeed, has a large annual surplus derived from the payments made by patients.

In *Blake* v. *Mayor and Citizens of London* (1) it was held that the words "public school" in the rule were not limited to public schools maintained wholly by charity, but applied to a public school maintained partly by charitable endowments and partly by fees charged for instruction; but it was assumed, both in the Divisional Court and the Court of Appeal, that some charitable element was necessary in order to satisfy the words creating the exemption. "The intention" of the Act, says Denman, J. (2), "seems to have been to exempt not merely institutions which were purely charitable, but institutions ejusdem generis with the colleges and halls which form the first class of property exempted. There can be no doubt that the colleges and halls of the universities are not institutions wholly supported by charity . . . The enactment seems to have been drawn with a mixed intention, namely to exempt charitable institutions, and to exempt certain institutions partly depending on charity, perhaps in view of the beneficial character of the objects of those institutions."

We concur with this exposition of the intention of the Act, and we therefore proceed to inquire whether there is here any charitable element in the means by which this institution is supported. We can see none. It was urged upon us that as the hospital buildings and premises were originally purchased out of money subscribed by benevolent persons, there is a charitable element in this sense, that the hospital has no rent to pay. But we do not think the fact that in its origin the institution was founded by voluntary charitable donations is sufficient to constitute it an institution partly maintained by charity. It was started by charity, but is maintained wholly out of payments made by those who use it. In the case of the City of London School above referred to, there was an annual endowment provided by Act of Parliament. The corporation of the city of London were bound by that statute to pay 900*l.* per annum towards the support of the

(1) 18 Q. B. D. 437; 19 Q. B. D. 79. (2) 18 Q. B. D. at pp. 444, 445.

school; and this was considered a material circumstance in the judgments of the Court of Appeal and Divisional Courts. Here there is no annual charitable endowment at all. The hospital property is said to be vested in trustees, but the terms of the trust are not set forth in the case, and we are left in doubt as to what would become of the property if it were thought expedient to close the institution. Whatever be the terms of the trust, the case is very different from that of the City School, where, as we have already pointed out, there was an annual sum provided by charity, and so far from making any profit out of the school there was a large yearly deficiency. Here there is no sum provided by charity; and instead of a deficiency there is a large profit from fees received. Looking at all the circumstances, we think that the Commissioners were right, and that this self-supporting institution is not a hospital within the meaning of the Act. There must therefore be judgment for the Crown with costs.

CASE No. 2.

In this case the question raised is whether the Barnwood House Institution was liable to pay inhabited house duty, or whether it comes within the exemption No. 4 of 48 Geo. 3, c. 55, which exempts "any hospital, charity school, or house provided for the reception or relief of poor persons." We think that this exemption, which specifies hospitals along with charity schools and poor-houses, must be construed in the same manner as we have construed the exemption in s. 61 of 5 & 6 Vict. c. 35, and that it does not include the case of a hospital not maintained by charity, but carried on, and carried on at a profit, by funds derived from patients who pay for their treatment.

Our judgment will accordingly be for the Crown with costs.

CASE No. 3.

In this case the question raised is whether Barnwood House Institution is entitled to exemption from the duties charged on profits under Schedule II. of the Income Tax Acts.

It was admitted by counsel for the appellant that the case could not be distinguished from *St. Andrew's Hospital, Northampton* v. *Shearsmith* (1), which decided that there was no exemption.

(1) 19 Q. B. D. 624.

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Therefore, in this case also there will be judgment for the Crown with costs.

Judgment for the respondent.

Solicitors for appellant: *Powell & Burt.*

Solicitor for respondent: *Solicitor for the Inland Revenue.*

J. R.

Aug. 7.

[IN THE COURT OF APPEAL.]

HESKETH, APPELLANT. BRAY, SURVEYOR OF TAXES, RESPONDENT.

Revenue—Income Tax—Duty on Income from Lands—Deduction for Cost of Embankment to protect Lands against Encroachment of Tidal River—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *Schedule A., s.* 37.

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 37, in charging the duty under Schedule A. in respect of lands a deduction is to be made for the amount expended by the owner on an average of the twenty-one preceding years in the making or repairing of sea-walls or other embankments "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river."

The appellant was assessed to the income tax under Schedule A. in respect of the annual value of certain lands. These lands had prior to 1880 been salt marshes adjoining a tidal river, which were liable to be flooded at every tide, and had a small yearly value as pasturage. The appellant began in 1880 to construct an embankment for the purpose of excluding the water from these lands, which was complete in 1885, and the lands were by the construction of such embankment converted into valuable inclosed lands, of much greater value than in their previous state as salt marshes:—

Held (affirming the judgment of the Queen's Bench Division) that the appellant was not entitled to any deduction under s. 37 on the ground that the embankment constructed by him was not "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river," within the meaning of the section, inasmuch as the section did not apply to embankments made for the improvement of the land by altering its condition, but only to embankments made for its protection or preservation in its existing state.

APPEAL from the judgment of the Queen's Bench Division (20 Q. B. D. 589), upon a case stated by the Commissioners of Income Tax.

The facts are fully set forth in the report of the case in the court below, and may for the purposes of this report be briefly stated as follows: The appellant appealed against certain assess-

ments made upon lands of which he was owner under Schedule A. of the Income Tax Act, 1853, claiming to be allowed under s. 37 of that Act a deduction on an average for twenty-one years of a sum of 16,541*l.*, expended by him since the beginning of the year 1880 in making an embankment for the protection and preservation, as alleged, of such lands from the overflowing of the tidal river Ribble. It appeared that prior to 1880 the lands assessed were salt marshes covered with short herbage and liable to be more or less flooded by the river Ribble at every tide, and were in that condition worth as pasturage from 5*s.* to 10*s.* an acre per annum. In 1880 the appellant began to make an embankment to exclude the tidal water from the lands in question, which was completed in 1885, the total cost of such works being 16,541*l.* The land became, upon the tidal water being excluded, worth 3*l.* to 3*l.* 10*s.* an acre per annum. The Income Tax Commissioners were of opinion that the appellant was not entitled to the deduction claimed, but stated a case for the opinion of the Queen's Bench Division. The Divisional Court (Pollock, B., and Hawkins, J.) were of opinion that the Commissioners were right and dismissed the appeal.

C. A. Cripps and *Craies*, for the appellant. As the land now exists, the embankment is clearly necessary for its protection and preservation from the tidal water. The question is whether the word "lands" in s. 37 of the Income Tax Act, 1853, means the lands as they exist when assessed, or as they existed before the embankment was made. The lands in question are assessed as they exist when the embankment has been made and on the improved value after the sea has been excluded; and it is contended that the fair and reasonable construction of the section is that the words "necessary for the protection and preservation of such lands" refer to the lands in the state in which they are as assessed. Of course if the word "lands" in that sentence means the lands in their unimproved state, the embankment would not be necessary for the protection or preservation of such lands from the encroachment or overflowing of the sea. But it is contended that such is not the meaning.

A. V. Dicey, for the respondent, was not called upon.

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LORD ESHER, M.R. I agree with the view taken by the Divisional Court in this case. The question seems mainly to be what are the lands which the legislature are referring to, when they speak of the making or repairing of embankments "necessary for the preservation or protection of such lands from the encroachment or overflowing of the sea or any tidal river." I should say that they referred to the land as it existed at the time when the embankment was made. If the embankment was necessary for the purpose of the protection of the land as it then existed, I should say that the deduction was to be allowed, but, if the embankment was not made for that but for some other purpose, I should say that the case did not come within the words of the section and that the deduction ought not to be allowed. At the time when this embankment was made the only value the land in question had was as a salt marsh, which was flooded from time to time by the tide. So far as that was concerned, it could not be necessary to protect the land by an embankment. If this had been agricultural land, and by reason of the shifting of the bed of the river it were threatened with overflow, the case would be different, and it might be necessary for the protection of the land as it existed, viz., as agricultural land, to make an embankment. Here the embankment was not made to protect the land as it existed, but to alter its existing condition and to turn it into land of a different character. Any expenditure in maintaining this embankment for the protection of the land as it now exists would, I think, be within the words of the section authorizing the deduction, but I do not think expenditure incurred in altering the existing character of the land is within the words of the section. For these reasons I think the decision of the Court below was right, and this appeal should be dismissed.

LINDLEY, L.J. I am of the same opinion. The first question that occurs to me is, what was the necessity when this embankment was made for protecting or preserving the land from encroachment or overflow of the sea or a tidal river at all? There is no suggestion that there was any such necessity with regard to the land in its existing state. There was no such necessity, but the owner thought it would be profitable if the water could be pre-

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vented from coming over the land and the land thereby improved. To effect this object an embankment was, no doubt, necessary. It is argued that that embankment comes within the words "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river." But there was no necessity for keeping the water out, except for the purpose of making the land more profitable than in its existing condition. I do not think that this case is within the words of the section.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for appellant: *Torr, Janeway, & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

E. L.

[IN THE COURT OF APPEAL.]

May 18; *June* 4.

DEARLE *v.* GUARDIANS OF PETERSFIELD UNION.

*Local Government Acts—Guardians of the Poor acting as Rural Sanitary Authority—Limitations—*22 & 23 *Vict. c.* 49, *s.* 1—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 9.

Sect. 1 of the Act 22 & 23 Vict. c. 49, enacts that any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards.

By s. 9 of the Public Health Act, 1875, the guardians of a rural union shall form the rural sanitary authority of that district, and "all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for purposes of this Act."

Held, that s. 9 of the Public Health Act, 1875, does not extend the limitation of time imposed by s. 1 of the previous Act to debts contracted by guardians in their capacity of rural authority, but that that limitation still remains applicable only to debts contracted by guardians as such.

APPEAL by the defendants against an order of Butt, J., that judgment should be entered for the plaintiff on paragraph 10 of the defendants' statement of defence.

The plaintiff was a contractor; the defendants were the

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guardians of the poor of the Petersfield Union. The plaintiff sued the defendants, as the sanitary authority of the rural sanitary district of the union, to recover certain sums which he alleged to be due from them to him in respect of certain contracts for the construction of sewers, the laying of watermains, the erection of an engine and boiler-house, and the construction of a covered service reservoir.

By paragraph 10 of their statement of defence the defendants said, that the "plaintiff is suing in respect of a debt, claim, or demand which might be lawfully incurred by or become due from the defendants as guardians of the poor of the Petersfield Union after the passing of 22 & 23 Vict. c. 49, and the plaintiff did not commence any proceedings for the said debt, claim, or demand within the half-year in which (if at all) the same was incurred or became due, or within three months after the expiration of such half-year, as by the said statute required.

At the trial of the action before Butt, J., without a jury, the learned judge directed that judgment should be entered for the plaintiff on paragraph 10 of the defence, and by consent ordered that all other questions in the action should be referred to a barrister.

The defendants appealed against the decision on the point of law.

Lumley Smith, Q.C., and *G. G. Greenwood*, for the defendants. The limitation of time within which debts incurred by guardians of the poor must be paid, which is imposed by s. 1 (1) of

(1) The preamble of the Act 22 & 23 Vict. c. 49, recites, that "it is expedient to define and limit the period during which any debt hereafter incurred by guardians of unions or parishes, or by district boards of management, in the administration of the laws for the relief of the poor, may be paid, and to make provision, in respect of debts heretofore lawfully incurred by them, for payment of the same."

By s. 1: "With respect to any debt, claim, or demand, which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed

the Act 22 & 23 Vict. c. 49, is by s. 9 of the Public Health Act, 1875, extended to debts incurred by guardians in their character of a rural sanitary authority. The preamble of the former Act does not, as Butt, J., thought, limit the effect of s. 1. But, at the time when that Act was passed, guardians were only concerned with the administration of the laws for the relief of the poor. The Public Health Act of 1875 imposed on them the duties of a rural sanitary authority. The action not being brought within the time limited, the recovery of the debt is barred: *Baker* v. *Guardians of Billericay Union* (1); *Reg.* v. *Guardians of Stepney Union* (2).

The expenses incurred by a rural sanitary authority under the Act of 1875, are by s. 229 divided into "general expenses" and "special expenses." The expenses of constructing sewers and providing a supply of water are "special expenses." "General expenses" are made payable out of a common fund, to be raised out of the poor-rate of the parishes in the district; "special expenses" are made a separate charge on each contributory place. In *Rhodes* v. *Guardians of Pateley Bridge Union* (3) the

according to the order of the Poor Law Commissioners or Poor Law Board:" provided that the Poor Law Board may extend the time within which such payment shall be made.

By s. 4: "If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any Court of Law or Equity, ... within the time hereinbefore limited, or within the time to which the Poor Law Board may grant extension, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians or managers against whom or against whose officer the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided."

By s. 9 of the Public Health Act, 1875: "The area of any union which is not coincident in area with an urban district, nor wholly included in an urban district (in this section called a rural union), with the exception of those portions (if any) of the area which are included in any urban district, shall be a rural district, and the guardians of the union shall form the rural authority of such district. . . . . "Subject to the provisions of this Act, all statutes, orders and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for purposes of this Act; and it s hereby declared that the rural authority are the same body as the guardians of the union or parish for or within which such authority act."

(1) 2 H. & C. 642.

(2) Law Rep. 9 Q. B. 383.

(3) 51 L. T. (N.S.) 235.

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Queen's Bench Division treated the limitation mentioned in s. 1 of the Act of 1859 as applying to debts incurred by guardians in their character of rural sanitary authority. It may be said that, if this limitation applies, there will be a difference between debts incurred by a rural sanitary authority and debts incurred by an urban sanitary authority. But practically there will be the same limit in both cases, for, by s. 210 of the Act of 1875, an urban sanitary authority can only make a rate retrospectively to raise money for the payment of expenses incurred within six months before the making of the rate. Sect. 264 of the Act of 1875 provides that actions of tort against a local authority must be commenced within six months next after the accruing of the cause of action, so that, unless the Act of 1859 applies, there will be a difference between actions of tort and other actions as regards the time within which they must be commenced against sanitary authorities.

Robert Wallace, for the plaintiff. Sect. 210 of the Public Health Act does not limit the time for bringing actions against an urban authority; it only provides that an extra and special rate may be levied for certain purposes in the event of the ordinary rate not being sufficient. It may be that, if an action was brought after the expiration of the six months, the plaintiff could only levy execution on the property of the local authority. No limitation of the right of action against an urban authority has ever been pleaded, except that which is imposed by s. 264. In *Rhodes* v. *Guardians of Pateley Bridge Union* (1) the point now raised was not taken. There the action was brought by the engineer of the local authority. The claim was not for special expenses, as in the present case; s. 229. The distinction is this: the ordinary "general expenses" ought to be paid by the ratepayers for the time being for whose benefit they were incurred, but "special expenses," such as the cost of constructing sewers, are incurred for the benefit of future as well as present ratepayers, and should be spread over a term of years. The last clause of s. 230 shews that any surplus of a separate rate would not go over to the Poor Law Fund. The limitation of time imposed by the Act of 1859 applies only to the particular classes of debts specified in

(1) 51 L. T. (N.S.) 235.

the preamble of that Act—debts relating to the relief of the poor. It could not have been the intention of the legislature by the general words of s. 9 of the Public Health Act to incorporate that limitation into that Act, and, if the very words of s. 1 of the Act of 1859 had been incorporated, they would not apply to the present case.

Lumley Smith, Q.C., in reply. In *Reg.* v. *Guardians of Stepney Union* (1), Lord Blackburn said (at p. 399), that the words "claim and demand" would cover everything. When a rate for a general district fund has been collected and paid over to the guardians it forms that fund, and any surplus is retained for the purposes of that fund.

Cur. adv. vult.

1888. June 4. LINDLEY, L.J. (after stating the nature of the action.) We have only to decide now the question of law which is raised by par. 10 of the statement of defence, viz., whether what I may call the particular statute of limitations contained in s. 1 of the Act 22 & 23 Vict. c. 49, applies to the claim made by the action. Mr. Justice Butt has decided that it does not.

The question turns primarily upon the construction of s. 1 of the Act 22 & 23 Vict. c. 49, and s. 9 of the Public Health Act, 1875; other sections may throw more or less light upon it, but the question really turns upon these two sections. [The Lord Justice read the preamble and s. 1 of the Act of 1859, and continued:—] The first point to be considered is, whether the present claim is within s. 1 at all. It is obvious that, at the time when that Act was passed, guardians of a union could not enter into contracts for the construction of sewers, or the laying of water-mains, or the erection of engine and boiler-houses. If, therefore, the Act of 1859 stood alone, though the words of s. 1 are quite general, yet, when they are explained by the preamble, it is clear that such contracts would not have been within them at all. Until the Public Health Act, 1875, was passed the guardians of a union had nothing to do with such contracts. But by s. 9 of that Act the guardians of a union are in many cases made the rural sanitary authority of a district, and it is provided that "all

(1) Law Rep. 9 Q. B. 383.

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statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for purposes of this Act." It is contended on behalf of the appellants, that the effect of those words is to transfer to the guardians in their capacity of rural sanitary authority all the provisions of the previous Act which relate to them in their capacity of guardians, including the statutory limitation which is contained in s. 1 of the previous Act. I think the object of s. 9 has been misunderstood by the appellants. In my opinion s. 9 does not extend the provisions of the previous statutes relating to guardians of the poor to all acts which the rural sanitary authority may do, but it merely extends those provisions to the sanitary authority when they are exercising the powers of guardians. I think that the construction which Butt, J., has given to s. 9 is correct, and it appears to me to be fortified by ss. 229 and 230, which relate to "special expenses." The expenses of the works to which these contracts relate are "special expenses." It is unnecessary to refer to these sections at length, but the key to them is this—the "general expenses" are to be paid out of one fund, the "special expenses" are to be paid out of another. Sects. 209 and 210, which were referred to in the course of the argument, throw no light on the point, and the Local Government Board Act of 1871 (34 & 35 Vict. c. 70), does not affect it one way or the other. Sect. 264 of the Public Health Act does not apply to such an action as this; it applies only to actions of tort. In my opinion, the appeal must be dismissed with costs.

BOWEN, L.J. I am of the same opinion. When we look at the preamble of the Act of 1859 it is clear that the limitation of time contained in s. 1 applies only to debts, claims, and demands which are incurred by or become due from the guardians of any union *as such*. It appears to me, therefore, manifest that, when s. 9 of the Public Health Act makes applicable to guardians in their capacity of rural sanitary authority the limitation of time contained in the Act of 1859, which was previously applicable to them as guardians, it does not extend the nature of the debts, &c., to which that limitation applies. Sect. 1 of the Act of

1859 is confined to a particular class of debts, viz., those which are contracted by guardians as such.

Appeal dismissed.

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Solicitors for defendants: *Soames, Edwards, & Jones, for Soames & Caparn, Petersfield.*

Solicitor for plaintiff: *Ernest A. Fuller.*

W. L. C.

[IN THE COURT OF APPEAL.]

July 18, 19, 20.

SIMKIN AND OTHERS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Negligence—Railway Company—Locomotive Engine at Station—Noise of Steam.

In an action against the defendants, a railway company, it appeared that the plaintiffs were leaving a station belonging to the defendants in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station which was blowing off steam, and the carriage was upset and the plaintiffs injured. It did not appear that the engine was defective or that it was used in an improper manner, or that the approach to the station was inconvenient, but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident:—

Held, by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) (Fry, L.J., doubting), that the defendants were not liable, as there was no evidence of any obligation on their part to screen the railway from the road.

ACTION by the plaintiffs, a mother, son, and daughter, to recover damages for injuries which they had sustained by the upsetting of a carriage, caused, as they alleged, by the negligence of the defendants.

At the trial, before Manisty, J., and a jury, it appeared that the two female plaintiffs arrived by the defendants' railway at the Bletchly station, and were there met by the son in a wagonette. As they were driving out of the station inclosure the horse was frightened by an engine on the line blowing off its steam. The engine was just starting and was blowing off the steam in intermittent blasts; the horse got out of the control of the driver, and, in going out of the gate, the carriage was upset and the plaintiffs severely hurt. The evidence adduced at the trial as to the acci-

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dent and the situation of the defendants' station with regard to the roadway is fully considered in the judgments of the Court. The plaintiffs had alleged as particulars of negligence (1) that the steam was blown off in an unnecessary and improper manner; (2) that the engine was defective and improper; (3) that the roadway forming the approach to the station was narrow and inconvenient for the ordinary purpose of traffic to or from the station; (4) that the line of railway at the station was not properly and sufficiently screened from the roadway forming the approach to the railway. The second and third grounds of complaint were abandoned at the trial, and the jury found the first in favour of the defendants; but they found that the defendants had been guilty of negligence in not properly and sufficiently screening the railway from the road, and that such negligence had caused the accident. The learned judge entered judgment for the plaintiffs.

Upon application to enter the verdict for the defendants on the ground that there was no evidence of negligence on their part, or for a new trial, the Divisional Court (Huddleston, B., and Charles, J.) set aside the verdict and gave judgment for the defendants.

The plaintiffs appealed.

Lockwood, Q.C., E. Tindal Atkinson, Q.C., and *C. M. Atkinson*, for the plaintiffs. The evidence shewed that the horse was frightened by the sight of the engine rather than by the noise: and even if the noise contributed to its fright, that would have been much deadened by a proper wall screening off the railway. The defendants were under an obligation to make their station and the approaches to it reasonably safe. The plaintiffs were not mere licensees using the station at their own risk; they were in the station at the invitation of the defendants on the ordinary business of the defendants: *Indermaur* v. *Dames*. (1)

Sir E. Clarke, Q.C., S.G., and *Forbes Lankester*, for the defendants. It must be taken that the defendants were not guilty of negligence in the construction or mode of using the engine. The only question is whether they were negligent in not screening it

(1) Law Rep. 2 C. P. 311.

from the road by which the public entered and left the station. In the first place, there is no evidence that the horse was frightened by the sight of the engine; the evidence shews that it was the noise that startled it, and the noise would be very slightly deadened, if at all, by a screen. In the second place, there is no obligation on the defendant company to take greater precautions at their station than they would do in running near a highway. They had statutory powers to use locomotives, and the jury have found that they have not abused those powers by using the engine negligently, and the public have notice that all engines are liable to frighten horses: *Gautret* v. *Egerton* (1); *Watkins* v. *Great Western Ry. Co.* (2) It is true that the plaintiffs were not mere licensees, they came on the business of the company; but there was no hidden danger, as in *Indermaur* v. *Dames*. (3) They knew that the station was a junction, and that there were constantly locomotives there letting off steam. The fact that the station had been open for twenty years and no similar accident had occurred is sufficient evidence that there was no structural defect in the station.

Lockwood, Q.C., in reply.

Cur. adv. vult.

1888. July 20. LOPES, L.J., delivered the judgment of himself and COTTON, L.J. This is an action brought by the plaintiffs against the defendants to recover damages for alleged negligence causing personal injuries to the plaintiffs. The plaintiffs alleged negligence in the following respects: first, because the defendants' servants negligently caused a locomotive engine to blow off steam with a loud noise and in an unnecessary and improper manner; secondly, because the engine was defective and improper; thirdly, because the roadway forming the approach to the defendants' station was narrow and inconvenient for the ordinary purposes of traffic to and from the station; fourthly, because the defendants' line of railway at the station was not properly and sufficiently screened from the roadway forming the approach to the railway. The second and third grounds of

(1) Law Rep. 2 C. P. 371. (2) 46 L. J. (Q. B. D.) 817.
(3) Law Rep. 2 C. P. 311.

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complaint were abandoned at the trial, and the jury found the first cause of complaint in favour of the defendants. It must, therefore, be assumed that the engine was neither defective nor improper, that the roadway was neither narrow nor inconvenient, and that the defendants' servants were not guilty of negligence in blowing off the steam with a loud noise and in an unnecessary and improper manner, and so causing the accident. But the jury found that the defendants were guilty of negligence in not properly and sufficiently screening the railway from the road, and by such negligence caused the accident to the plaintiffs. An application was made to a Divisional Court to enter judgment for the defendants on the ground that there was no evidence of any negligence on the part of the defendants in not properly and sufficiently screening their railway from the road, and no evidence of their causing the accident to the plaintiffs by such negligence, and in the alternative for a new trial. The Divisional Court was of opinion that there was no evidence to justify the findings of the jury, and accordingly entered judgment for the defendants. Against this decision of the Divisional Court the plaintiffs have appealed. The plaintiffs were bound to give evidence upon which a jury would be justified in finding that the defendants were negligent in not sufficiently and properly screening their railway from horses coming to their station, and also that this particular negligence caused the accident to the plaintiffs. If they did not give evidence which would justify a jury in finding both those questions for them they failed. We will deal with the two questions separately. Was there any evidence of negligence by the defendants in respect of not sufficiently and properly screening their railway from the road? Negligence would mean the omission by the defendants to do something which persons conducting a railway with reasonable care and caution should do. It is said the defendants were wanting in reasonable care towards those who left their station, because they did not erect a fence between the roadway to the station and the railway itself sufficient to prevent the horses of passengers coming to and going from their station seeing and hearing the engines on the railway. There is no statutory obligation to erect such a screen. The company were carrying on a

business authorized by the legislature. The duty which the defendants owed the plaintiffs was to provide a reasonably safe mode of leaving their station, having regard to the business they carried on at their station. There was a wooden open paling five feet high between the roadway and the railway. There was forty feet between the metals of the railway and this paling. The station, and the paling, and the roadway had been in their then condition for twenty years. Three hundred trains arrive at this station in twenty-four hours. There was no suggestion that any accident had ever been caused by the insufficiency of this paling or screen. No person was called to say it was improper or insufficient. There was no evidence of its being improper or insufficient beyond the paling itself. We should hesitate long in such circumstances to hold that the paling by itself was any evidence of negligence in the defendants. In a vast number of railway stations the same state of things exist. Take, for example, the Great Western arrival platform at Paddington, where the carriages and cabs come to meet arriving passengers. They draw up and remain awaiting the arrival of the train within twenty feet of the incoming train, the engine of which passes them without any screen or anything interposed between the engine and the horses. Could it be successfully contended that if a horse became frightened at the sight or noise of the engine and ran away, injuring those in carriage or cab, that an action would lie against the Great Western Railway? Take the case of a highway carried over a railway by a bridge. The parapets on either side do not conceal the passing train from horses crossing the bridge; indeed, horses are constantly terrified by the noise, the sight, and the smoke of the passing train. Is it to be said that railways ought to erect parapets on either side of their bridge high enough to conceal the approaching engine? Such contentions could not, in our opinion, be for one moment entertained. We cannot think that in this case there is any evidence that ought to have been left to a jury of negligence by the defendants in not sufficiently and properly screening their railway from the road.

But, assuming we are wrong in this, then the further question

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arises whether this particular negligence (i.e., the not sufficiently and properly screening the railway from the road) caused the accident to the plaintiffs. It appears to us the only reasonable inference to draw from the evidence is that the horse was frightened and the accident caused, not by what the horse saw, and which an opaque screen might have prevented him seeing, but by the noise which the engine made—an engine proper in all respects—noises which the jury have found not to have been unnecessary or excessive, noises which the defendants by their engines were entitled to make, noises which were a necessary incident to the carrying on of that business which the legislature had authorized, and noises which no screen could have prevented. Take Mr. Peake's account, who drove the horse and to whom the horse belonged. He says: "The horse started perfectly quiet from the station; there was a hissing noise from the engine, and the horse pricked his ears; I looked up and saw an engine in front of me. The intermittent noise kept going on, and the horse kept continually quickening his pace at each blast of the engine. At each blast of the engine he sprang, and I felt he was getting out of hand. I kept holding him in and he kept springing forward, and at each stroke he got more out of hand." Again, take Mr. Simkin's account. "The horse," he says, "was going quietly up to the time he heard the first steam emitted, and then he sprang forward, considerably quickened his pace, and each time that he heard the steam coming forward he gradually got faster and faster; the horse, each time he heard the noise, got faster and faster." Again, Miss Florence Simkin says: "When I reached the end of the station buildings I heard a noise like the whizzing of an engine; as each blast of the steam came the horse sprang forward." Curtis also speaks of the noise of the engine frightening the horse, and he also says Peake had got in front of the engine before it moved. The only reasonable inference deducible from the evidence, to our mind, is the inference that it was the noise and not the sight of the engine which frightened the horse and caused the accident. We are, therefore, of opinion that even if the defendants were negligent in not screening their railway from the sight of this horse, that there is

no evidence in the case which would justify a jury in saying that such negligence caused the accident. The appeal must be dismissed.

FRY, L.J. The railway company were under an obligation to provide means of access to and egress from their station reasonably safe and suited for the carrying on of the business which their Act of Parliament authorized them to carry on. The question in this case is whether it was reasonably safe. The blowing off of steam from the railway engine had the effect of creating a hideous noise by fits and starts, and the engine also presented a somewhat startling appearance. The structure of the station in question was such that the horse, while standing at the station, would be sheltered from the engine; but as the horse was driven out and emerged from the shelter, he found himself in close proximity to the engine, which was blowing off steam and which also presented a hideous and terrifying aspect. I cannot help thinking that in this structure of the station there was a very probable source of danger to persons driving to and from the station. The question is whether this danger would have been lessened by placing a screen as suggested. It would no doubt have shut out the sight of the engine which was blowing off steam from the horse and have deadened the noise made thereby. It was not unreasonable for a jury to come to the conclusion that the steam blown off would have been less terrifying if a screen had been there.

The next question is whether there is any evidence that the want of a screen in this particular case was the cause of the accident that has occurred. The evidence shews that it was the sound of the steam rather than the sight of the engine that terrified the horse. The engine began to make a noise before the horse left the shelter of the station and got in sight of the engine. The noise was at first deadened by the buildings, but when the horse emerged it saw the engine and it heard the noise more distinctly. If it was left to my judgment, without the influence which is exercised on it by the previous decisions of other judges, I should say that there was evidence which would justify the jury in finding that it was the want of the screen

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which was the very cause of the accident in the present case. But I cannot shut out from my mind that there has been a long series of decisions in which, under circumstances not unlike the present, judges have exercised great subtilty in narrowing the findings of the jury in similar cases. I do not say that the rights of the jury have been infringed, but that judges have held a tight rein over them. The reason of this was that the judges felt that in the conflict before a jury between an individual who excited sympathy and a railway company which excited none, the jury should be kept in hand with regard to the verdicts which they found. My mind is out of sympathy with many of these cases, and I believe that if left to myself my decision would not have been that of the great majority of judges who have tried similar cases. But I feel that the view now taken by my two learned brethren, Cotton and Lopes, L.JJ., is more in accordance with previous decisions. Consequently I do not dissent from their opinion, but I give my assent with great reluctance.

Appeal dismissed.

Solicitors for plaintiffs: *Cowper, Thorowgood & Tabor, for Bond, Barwick & Peake, Leeds.*

Solicitor for defendants: *C. H. Mason.*

M. W.

ATTORNEY-GENERAL *v.* MONTEFIORE AND OTHERS. 1888 *July* 2.

Revenue—Succession Duty—"Disposition of Property"—16 & 17 *Vict. c.* 51, *ss.* 1, 2, 16.

By deed making provision for an endowment the donor covenanted that he or his executors or administrators after his death would transfer certain Bank stock and certain shares into the names of trustees, and by another deed of the same date he declared that the trustees should stand possessed of the stock and shares upon trust for certain charitable purposes. By a subsequent deed he covenanted that he, or his executors or administrators after his death, would transfer a further amount of Bank stock into the names of the trustees, and declared that they should stand possessed of it on the same trusts. After the death of the donor, his executors transferred the stock and shares into the names of the trustees:—

Held, that the deeds shewed a "disposition of property" within s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and that the stock and shares so transferred were chargeable with succession duty.

Lord Advocate v. *Roberts's Trustees* (20 Scotch Sess. Cas. 2nd Series, 449) followed.

In re Higgins (31 Ch. D. 142) discussed.

INFORMATION by the Attorney-General claiming succession duty in respect of 10,500*l.* Bank stock and 500 shares in the Alliance British and Foreign Life Assurance Company, forming the endowment of the Ramsgate Jewish synagogue and college of which the defendants were trustees.

It appeared that by an indenture dated February 24, 1866, Sir Moses Montefiore conveyed the fee simple of the site of the synagogue and college to trustees and covenanted that "he during his lifetime, or his executors or administrators within one calendar month after his decease, would transfer into the joint names of the trustees, or the survivors or survivor of them, the sum of 9000*l.* Bank stock and 500 shares of the Alliance British and Foreign Life and Fire Assurance Company"; that by an indenture, also dated February 24, 1866, reciting the conveyance of the site and the covenant for the transfer of the stock and shares, Sir Moses Montefiore declared that the trustees "should stand seised of the lands and should stand possessed of" the stock and shares upon trust for the perpetuation, maintenance, and support of a synagogue and a college; and that, by an inden-

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ture dated April 7, 1870, Sir Moses Montefiore covenanted with the trustees that "he during his lifetime, or his executors and administrators within one calendar month after his decease, would transfer into the joint names of the trustees, or the survivors or survivor of them, a further sum of £1500 Bank stock," and declared that the trustees should stand possessed of such sum "upon the like trusts as were expressed in the second indenture of February 24, 1866." After the death of Sir Moses Montefiore in 1885 his executors transferred the stock and shares mentioned in the indentures referred to into the names of the defendants.

Sir R. E. Webster, A.G., and *F. V. Hawkins*, (*Sir E. Clarke, S.G.*, with them), for the Crown. The stock and shares are "property" which has been the subject of a "disposition" by the settlor, and are therefore chargeable with succession duty under 16 & 17 Vict. c. 51, ss. 1, 2; 16. (1) By s. 1 "money payable under any

(1) By 16 & 17 Vict. c. 51, s. 1: "In the construction and for the purposes of this Act the term 'real property' shall include all freehold, copyhold, customary, leasehold, and other hereditaments and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments.

"The term 'personal property' shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property.

"The term 'property' alone shall include real property and personal property.

The term "succession" shall denote any property chargeable with duty under this Act."

By s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 16: "Where property shall become subject to a trust for any charitable or public purposes under any past or future disposition, which, if made in favour of an individual,

engagement" is constituted "property" within the meaning of s. 2. "Disposition" in s. 2 means a transfer of the beneficial interest in "property." In the case of the settlement of 1866 the first deed may not amount to a "disposition of property," but the second deed contains a declaration of trust for the benefit of the synagogue and college and vests the beneficial interest of the "property" in the charitable object. This is a "disposition of property" such as to attract the tax. The deed of 1870, which also contains a declaration of trust, has the same effect. The Act extends to Scotland, and in Scotland the question was decided in favour of the Crown in 1858 by the Lord Ordinary in the case of *Lord Advocate* v. *Roberts's Trustees.* (1) [They also cited *In re Micklethwait.* (2)]

Cookson-Crackanthorpe, Q.C., and *J. M. Solomon*, for the defendants. It is not contended on behalf of the trustees that the case can be distinguished from that of *Lord Advocate* v. *Roberts's Trustees* (1); but the decision of the Lord Ordinary is not binding on the Court. The point has also recently arisen in an indirect manner in the Court of Appeal in *In re Higgins* (3), and has been there dealt with in such a way as to render the former decision of doubtful authority. There the father of a married woman having covenanted with trustees that, inter alia, a sum should be paid to them after his death as a provision for his daughter, it was agreed for the purposes of the trial that the Crown was entitled to claim succession duty on the amount received by the trustees from the executors under the covenant. The Court of Appeal, however, expressed dissatisfaction that such an agreement had been entered into, and appeared to be of opinion that succession duty was not chargeable. The claim of the Crown in *Lord Advocate* v. *Roberts's Trustees* (1) rested on similar facts, and if the dicta in *In re Higgins* (3) are correct, could not be supported. It is submitted that the transfers of the stock and shares by the executors have

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would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of ten pounds per centum upon the amount or principal value of such property."

(1) 20 Scotch Sess. Cas. 2nd Series, 449.

(2) 11 Ex. 452.

(3) 31 Ch. D. 142.

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been made in satisfaction of mere covenants by the testator for the payment of money after his death, covenants which could not create any charge on the assets, and that therefore the information fails to shew a "disposition of property" within the meaning of s. 2 of the Act. [They also cited *Lord Saltoun* v. *The Advocate General* (1) and *Fryer* v. *Morland.* (2)]

F. Vaughan Hawkins, in reply.

MANISTY, J. The Court has to decide the simple question whether or not, using the word "disposition" according to its ordinary meaning, and having regard to the definitions of the words "property," "ancestor," and "successor" which are contained in the statute, the founder of this institution has made a "disposition of property" such as to render the endowment chargeable with succession duty.

As regards the statutory definitions, "money payable under an engagement" is expressly included in the term "property," the founder is clearly a "predecessor" and a trustee of the charity is equally clearly a "successor" according to the interpretation clause. As regards "disposition," it is suggested that the engagement entered into by the founder is not a "disposition of property" but a mere covenant the remedy for the breach of which sounds in damages. The word "disposition" is employed in its ordinary sense, and when a settlor covenants himself to transfer in his lifetime, and that if he fails to do so in his lifetime his executors or administrators shall within a month of his death transfer, an amount of Bank stock and a number of shares in a company to trustees for a charitable purpose, it is plain that the settlor makes in an ordinary sense a "disposition" of so much of his property. The case of *Lord Advocate* v. *Roberts's Trustees* (3) is an authority in favour of the Crown. The settlement in that case was of money, but the principle is the same, and it was there argued, as it has been argued here, that the information shewed a "mere obligation of debt" but no "disposition of property." I agree with the judgment of the Lord Ordinary. As to *In re Higgins* (4), the dicta in the Court of Appeal are entitled to the

(1) 3 Macq. 659.
(2) 3 Ch. D. 675.
(3) 20 Scotch Sess. Cas. 2nd Series, 449.
(4) 31 Ch. D. 142.

highest respect, but the decision does not affect the present question. I am, therefore, of opinion that our judgment should be for the Crown.

CHARLES, J. I am of the same opinion. The Act applies to the whole United Kingdom, and the question was decided in favour of the Crown in the Scotch Court of Session in *Lord Advocate* v. *Roberts's Trustees* (1) thirty years since. Even, therefore, if I were disposed to dissent from the judgment of the Lord Ordinary in that case, I should not feel at liberty to do so; but I agree with his decision. Here the arrangements made by Sir Moses Montefiore by the two deeds of 1866 and the deed of 1870 obviously have the effect of rendering "money payable" under "an engagement." Now, by s. 1 of the Act "money payable under any engagement" is constituted "property." Substituting "money payable under any engagement" for "property" in s. 2 that section runs, "every disposition of money payable under any engagement by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person . . . shall be deemed to confer a sucession." Why are not these arrangements a "disposition" of "money payable under an engagement"? I confess that I had difficulty in even following the argument for the defendants on the construction of the deeds. It was suggested that the covenants to pay money were all that the deeds contained in the nature of a disposition of property. But I cannot think this the true construction of the deeds. The deeds, in my opinion, contain covenants to pay money accompanied by dispositions of the funds covenanted to be paid. The covenantor is therefore a "settlor" within s. 2 and his arrangements constitute a "disposition of property" within s. 2 of the Act. In *In re Higgins* (2), in which the parties, probably regarding the point as long settled, consented that the case should be argued on the assumption that succession duty was payable on the fund, it is true that a doubt was expressed in the Court of Appeal as to whether *Lord Advocate* v. *Roberts's Trustees* (1) and *In re Micklethwait* (3) had decided

(1) 20 Scotch Sess. Cas. 2nd Series, 449. (2) 31 Ch. D. 142.
(3) 11 Ex. 452.

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the question, but the Court did not overrule or even dissent from *Lord Advocate* v. *Roberts's Trustees.* (1) *In re Micklethwait* (2) is a decision on the 38th section of the Act. *Fryer* v. *Morland* (3), which was also referred to, only decides that the Act does not apply to a conveyance by way of sale. Interpreting, as we are bound to do, the word "disposition" according to its ordinary meaning, there is in my opinion no doubt that this information shews a "disposition" by the covenantor of his property. Our judgment must therefore be for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor to the Inland Revenue.*
Solicitors for defendants: *Lindo & Co.*

H. D. W.

July 2.

EX PARTE SITWELL. IN RE DRURY LOWE'S MARRIAGE SETTLEMENT.

Revenue—Succession Duty—Power of Appointment—Acceleration of Succession by Extinction of prior Interests—16 & 17 *Vict. c.* 51, *ss.* 2, 15, 34.

By s. 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

By a marriage settlement the trust funds were settled upon trust to pay the income to the husband for life, and upon his death to the wife for life if she should survive, with remainder to the children of the marriage as the husband and wife jointly, or the survivor of them, should appoint, and in default of such appointment for the children who should attain the age of twenty-one, or die leaving issue, or marry, in equal portions. It was also provided that it should be lawful for the trustees during the joint lives of the husband and wife, or the life of the survivor, with their, his, or her consent in writing, and after the decease of both, at the discretion of the trustees, to raise and apply, or dispose of, all or any part of the then expectant part or share of any such child or issue whose share should not then be payable, for or towards the preferment, advancement or benefit of such child or issue.

During the lives of the tenants for life portions of the trust funds were appointed and paid over to the children by the trustees under the power in the settlement:—

Held, on the death of the surviving tenant for life, that as to the appointed

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(1) 20 Scotch Sess. Cas. 2nd Series, 449. (2) 11 Ex. 452.
(3) 3 Ch. D. 675.

part of the trust fund, there had been an acceleration of the title to the succession "by the extinction of prior interests" within 16 & 17 Vict. c. 51, s. 15, and that such part was, equally with the unappointed part, subject to succession duty.

APPEAL by the trustee of Mr. and Mrs. Drury Lowe's marriage settlement against an assessment to succession duty made by the Commissioners of the Inland Revenue.

By the settlement, which was executed in 1827, the trust funds were settled upon trust to pay the income to the husband for life, after his death to the wife for life if she should survive, with remainder to the children of the marriage as the husband and wife jointly, or the survivor of them, should appoint, and in default of such appointment for the children who should attain the age of twenty-one, or die leaving issue, or marry, in equal portions. It was also provided that it should be lawful for the trustees, during the joint lives of the husband and wife or the life of the survivor, with their, his, or her consent in writing, and after the decease of both then at the discretion of the trustees, to raise and apply or dispose of all or any part of the then expectant part or share of any such child or issue whose share should not then be payable for or towards the preferment, advancement, or benefit of such child or issue.

Eight children were born of the marriage, and between the coming into operation of statute 16 & 17 Vict. c. 51, in 1853 (1),

(1) By 16 & 17 Vict. c. 51, s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 15: "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto, under any such disposi-

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and the death in 1886 of the wife, the surviving tenant for life, sums amounting to 59,661*l.* were advanced by the trustees in pursuance of deeds of appointment, and at the latter date the unappointed trust fund amounted only to 3000*l.* The Commissioners claimed succession duty on 65,368*l.*, viz., on the appointed and unappointed parts of the trust fund, with a year's interest at 5 per cent. on the total sum advanced. The appellant contended that succession duty was chargeable only on the unappointed balance of 3000*l.*

W. Graham, and *P. B. Abraham*, for the appellant. The Crown is not entitled to succession duty on the sums advanced to the children under the powers in the settlement.

Sect. 2 of 16 & 17 Vict. c. 51, does not apply, as the children did not become entitled "upon the death of any person" to the sums advanced under the power of appointment. Unless, there-

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tion or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession, at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

By s. 34: "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may previously to his possession have laid out in the substantial repairs or permanent improvement of real property comprised in his succession: provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value pro tanto of such real property."

fore, there has been an "acceleration" of the succession "by the surrender or extinction of a prior interest" under s. 15, the part of the trust fund which has been the subject of the advances is not chargeable with succession duty. The question whether or not this has been the case depends upon whether the children are to be regarded as taking these sums under the limitation to them in remainder expectant on the death of their parents, or in consequence of the exercise of the special power of appointment which forms another limitation in the settlement. It is submitted that the title of the children depended entirely upon the exercise of the power, and in no sense upon the extinction of the prior life interests. According to the general rule of construction, a settlement containing a special power is after the exercise of the power read as though the power preceded and overrode the other limitations. Here the effect is to insert in the settlement, before the provisions relating to the life estates of the husband and wife, a provision for the payment by the trustees under the power, in certain events, of any part or all of the capital of the settlement fund to the children. The consent of the parents, though necessary to the action of the trustees, is not the origin of the title of the children. Apart from the trustees, the parents could not have effected the disposition, as the wife was legally incapable of assigning her reversion. The words "acceleration of title by the surrender or extinction of any prior interests," refer to cases of assignment by the remainderman of his remainder to the tenant for life or of release by the tenant for life of his life tenancy to the remainderman. Sect. 34 expressly recognises the exercise of a power as a method of lessening the liability to succession duty.

[They cited *Holyland* v. *Lewin* (1); *Brown & Sibly's Contract* (2); *In re Peyton.* (3)]

A. V. Dicey, (with him *Sir R. E. Webster, A.G.*, and *Sir E. Clarke, S.G.*), for the Crown. The effect of the settlement is to create a succession under s. 2, contingent as regards each individual child, certain as regards the eight children as a class. The power of appointment cannot be exercised except in favour

(1) 26 Ch. D. 266. (2) 3 Ch. D. 156.
(3) 7 H. & N. 265; 31 L. J. (Ex.) 50.

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of the children, and those of them who survive the surviving parent must become entitled to the unappointed balance. This succession has been "accelerated" within s. 15 by the vesting of the part of the trust fund which has been the subject of appointment in the children before the time at which, apart from the appointments, it would have become vested in them as remaindermen. [He was stopped by the Court.]

MANISTY, J. I am of opinion that this appeal should be dismissed. The case seems plain. If the advances had not been made, there clearly would have been at the death of the wife a succession under s. 2 of the Act as regards the whole trust fund. But s. 2 applies only to that part of the fund the title to which became vested in the children on the death of the wife. It does not apply to the sums advanced to them by the trustees with the consent of their parents prior to that event. But by s. 15, "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests," succession duty is payable "as if no such acceleration had taken place." If, therefore, there had been a surrender by deed of the life interests of the husband and wife in the sums advanced, it would have been impossible to contend that the section did not apply. The case would have been within the very terms of the section. The present case seems to me equally within the terms of the section. The word "extinction" exactly describes what has taken place. By the terms of the deed the life interests are to come to an end at the death of the surviving tenant for life, and may be put an end to, and therefore extinguished, before this by an exercise of consent on the part of the tenants or surviving tenant for life with the assistance of the trustees. The prior interest of the tenants for life in the sums advanced has been extinguished, and the title of the remaindermen to these sums has been accelerated by the extinction of the prior interest. Succession duty is therefore payable on these advances.

CHARLES, J. I am of the same opinion. It is plain that but for the appointments the children must have under s. 2 paid succession duty in respect of the whole trust fund. It is equally

plain that in consequence of the appointments they are not liable under s. 2 as regards the sums appointed, for their title to these sums did not arise upon a death. If liable, therefore, at all, in respect of these sums, they are liable as having had their "title to the succession" to them "accelerated by the surrender or extinction of a prior interest." It has been argued that there has been no "acceleration by the surrender or extinction of a prior interest," because the legal effect of the advances made by the trustees under the marriage settlement, with the consent of the parents, is that the children who have benefited take, so to speak, in priority to the life estates of the father and mother. But I do not think this a true view. I think that the title of these persons has been "accelerated." The expression is not a technical expression. Their title has been "accelerated" in that they have received a part of what would have come to them at the death of their parents sooner than they would otherwise have received it. And their title has been thus "accelerated" by the "extinction of the prior interest" of the parents, consequent upon the parents having given their consent to the action of the trustees in making the advances. Sect. 15, therefore, applies, and succession duty is payable on the whole trust fund.

Appeal dismissed.

Solicitors: *J. & W. Maude, for Taylor, Simpson, & Taylor, Derby; Solicitor to the Inland Revenue.*

H. D. W.

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June 28, 29.

IN RE CRIPPS, ROSS, & CO. EX PARTE ROSS.

Bankruptcy—Bankruptcy Act, 1883, *ss.* 45, 46—*Execution on Goods of Debtor —Sale by Sheriff—Retention of Proceeds by Sheriff—Time, Computation of.*

The period of fourteen days during which the sheriff is required by sub-s. 2 of s. 46 of the Bankruptcy Act, 1883, to retain in his hands the proceeds of goods sold under an execution commences to run from the date of the sale, and not from the date when the proceeds of the sale are received by him.

MOTION by A. Ross, an execution creditor, for a declaration that he was entitled, as against the trustee in bankruptcy, to a sum of 343*l.* in the hands of the sheriff of Surrey.

On January 23, 1888, the sheriff levied upon the goods and effects of the bankrupts under a judgment for 591*l.* 10*s.* 10*d.* obtained against them by the execution creditor.

On February 9 the sheriff sold under the execution, and received the bulk of the proceeds of sale on that day, but a small portion was not paid him until the next day, February 10.

On February 24 another creditor presented a bankruptcy petition against the bankrupts, and notice thereof was the same day served on the sheriff. Adjudication followed, and a trustee was appointed. The execution creditor had no notice of any available act of bankruptcy committed by the bankrupts prior to February 24.

The trustee in bankruptcy claimed the balance of the proceeds of sale in the hands of the sheriff on the ground that the fourteen days prescribed by s. 46 of the Bankruptcy Act, 1883, did not commence to run until February 10, and thereupon the execution creditor applied to the Court for a declaration that he was, as against the trustee in bankruptcy, entitled to such proceeds.

H. Reed, for the execution creditor. An execution creditor is entitled to the fruits of his diligence, unless it can be shewn that he comes within s. 45 or s. 46 of the Act. The question is from what date the fourteen days are to run—the completion of the sale has always been assumed to be the date from which the period has to run. It has never yet been suggested that it runs from the time of the receipt by the sheriff of the last of the

proceeds of sale. Similar words occur in s. 87 of the Bankruptcy Act, 1869, and were considered in *Ex parte Villars* (1) and *Jones* v. *Parcell* (2), but the point in question was not then raised. Why is the execution creditor to be deprived of his rights if the purchaser does not pay down his money at the time of the sale? It would be strange if the accident of a purchaser not paying until a few days had elapsed should have that effect, and it would cause the period to vary in each case.

Sidney Woolf, for the trustee. The fourteen days do not commence to run until the sheriff has received the whole of the proceeds of sale and deducted his costs. It is then that the sale is completed, and the balance ascertained. The grammatical construction of the section supports this view.

H. Reed, was not heard in reply.

CAVE, J. My decision must be in favour of the execution creditor. The point raised turns on the construction which ought to be placed on s. 46 of the Bankruptcy Act, 1883, which provides (sub-s. 2): "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l*., the sheriff shall deduct the costs of the execution from the proceeds of the sale and retain the balance for fourteen days, and if within that time notice is served upon him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him." Now, nothing is expressly stated there as to the date from which the fourteen days is to run, but one must look to the object in view in order to construe the statute, and when the reason and convenience of the thing are considered it is tolerably clear that the fourteen days are to run from the date of the sale. Sect. 46 must be read by the light of s. 45, which provides (sub-s. 1) that where a creditor has issued execution against the goods of a debtor, he shall not be entitled

(1) Law Rep. 9 Ch. 432. (2) 11 Q. B. D. 430.

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to retain the benefit of the execution, unless he has completed the execution before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor; and then sub-s. 2 says: "For the purposes of this Act an execution against goods is completed by seizure and sale." It is evident that for the purposes of s. 45 the date to be looked at is the date when the execution is completed, and that is, under sub-s. 2, the date of the sale. It is, therefore, convenient that the same date should be applied when construing s. 46, and under that section the fourteen days run, primâ facie, from the sale, which is the occurrence on which the sheriff's duty arises. But it is said that under the section the sheriff is to "deduct the costs from the proceeds of sale and retain the balance," and that those words are better satisfied if the fourteen days are held to run from the receipt of the last proceeds of the sale by the sheriff, because a man cannot retain that which he has not got. But the expression "retain the balance" is not used with reference to what is in the hands of the sheriff. The contrast is between his receiving it and the creditor receiving it. It is not a question as to the sheriff having the money in his hands, what it really means is that the sheriff shall not pay over until fourteen days have elapsed since the sale. It is also said that by the section "the sheriff shall deduct the costs of the execution from the proceeds of sale," and that that points to the fact that the fourteen days are to run from the receipt of the last shilling. But there is really no force in that argument. There is no difficulty in ascertaining the amount of the sheriff's costs and deducting them from the proceeds of sale, whether it is done on the fourteenth day, or at any time before. The object of this part of the section is that, whether the money is the trustee's or the creditor's, the sheriff shall have his costs out of it. The sale by the sheriff is advertised and generally known and cannot well be deferred; but with regard to the receipt of the money it is very different. It is quite possible that a purchaser might get hold of an article without paying for it, which might occasion great difficulty, and even necessitate his being sued. The general notion of the Act seems to be that a creditor shall not have the benefit

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of his execution if, before sale, notice is given to the sheriff, or if, the amount being over 20*l.*, notice is given to the sheriff within fourteen days after the date of the sale. That seems to give fair notice to creditors of the time within which a petition in bankruptcy must be presented; and, if fourteen days are allowed to pass without the presentation of a petition, the legislature seems to consider that the execution creditor should reap the benefit of his diligence. In my judgment, therefore, the fourteen days must run from the date of the sale, and not from the time when the proceeds are received by the sheriff. It follows that the petition in this case was one day too late, and that the execution creditor is entitled to the declaration for which he asks.

Solicitors: *Barton & Pearman; W. B. Styer.*

H. L. F.

[IN THE COURT OF APPEAL.]

July 13, 16; *Aug.* 3.

IN RE FINLEY. EX PARTE CLOTHWORKERS' COMPANY.

Bankruptcy—Disclaimer of Lease by Trustee—Sub-lease by way of Mortgage—Vesting Order—Terms and Conditions—Exclusion of Sub-lessee—Application by Original Lessor—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 55.

When the trustee in the bankruptcy of a lessee has disclaimed a lease, which the bankrupt had mortgaged by a sub-demise, the original lessor is, under s. 55 of the Bankruptcy Act, 1883, entitled to apply to the Court for an order vesting the property in the mortgagee, subject to the same liabilities and obligations as the bankrupt was subject to under the original lease in respect of the property at the date when the bankruptcy petition was filed, and, if the mortgagee declines to accept such an order, he will be excluded from all interest in and security upon the property.

Ex parte Shilson (20 Q. B. D. 343) approved and followed.

Whether, if such a vesting order is made, the mortgagee will be liable under the original lease to the same extent as if he had been the original lessee, or only as if he were an assignee of the original lease, *quære.*

APPEAL by C. A. Hanbury, a mortgagee by demise, dated July 12, 1882, from John Finley, a bankrupt, against an order of one of the registrars, that he (the mortgagee) should be excluded from all interest in and security upon the demised property, unless he should, within fourteen days from service of the order, elect to take and apply for an order vesting in him the whole of the

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property comprised in the above lease, subject to the same liabilities and obligations as the bankrupt was subject to in respect of the property, under a lease dated July 5, 1882, at the date of the filing of the bankruptcy petition.

On July 5, 1882, the Clothworkers' Company demised a public-house, called the "White Swan," to Finley, for a term of eighty years from December, 25, 1880, at an annual rent of 250*l.*, and subject to the performance and observance by the lessee of certain covenants and conditions in the lease contained.

On July 12, 1882, Finley executed a sub-demise of the public-house to Hanbury, for the residue of the term of eighty years, except the last day thereof, by way of mortgage to secure the repayment of 6600*l.*, then lent by Hanbury to Finley, and further advances as therein mentioned. And the mortgagor thereby declared that he would thenceforth stand possessed of the nominal reversion thereby reserved in the premises, for the entire residue of the term granted by the original lease, in trust for the mortgagee, and to dispose of the same as he, or the person or persons entitled to the term by the sub-lease granted, should from time to time direct, but subject to redemption as thereinafter mentioned. The mortgagor covenanted with the mortgagee to pay the mortgage debt and interest on demand by the mortgagee. Power was given to the mortgagee at any time to enter on the premises and to eject the mortgagor by force; whether having taken possession or not to demise the premises for any term not exceeding the original term; and to sell the premises, either for the term granted by the sub-demise or for the then entire residue of the original term. And the mortgagor appointed five persons named and any of them, his attorneys and attorney, for him and on his behalf and in his name (inter alia) to assign the nominal reversion in the premises thereby reserved to the mortgagor unto the mortgagee, or any other person or persons entitled to the term thereby granted, or as he or they should direct. There was also a provision that, as between the mortgagee and mortgagor, the said powers of entry, demising, and sale should not, nor should any of them, be exercised by the mortgagee unless default should have been made in payment of some moneys intended to be thereby secured according to the terms of the proviso for redemp-

tion, but that no purchaser or lessee should be concerned to see or inquire whether any such default had been made, or whether any money remained due on the security.

On August 23, 1882, Finley executed a second mortgage of the premises by way of demise to Messrs. Gorden & Co. On August 27, 1887, Finley presented a petition in bankruptcy, and on September 1, 1887, he was adjudicated a bankrupt. After the bankruptcy the mortgagee took possession of the mortgaged premises, and let them to a tenant. On December 21, 1887, an order was made by the registrar, giving the trustee in the bankruptcy liberty to disclaim his interest in the lease of July 5, 1882, and on the same day the trustee executed a disclaimer.

On January 2, 1888, the order now appealed against by the mortgagee was made, on the application of the original lessors.

Lumley Smith, Q.C., and *P. S. Gregory*, for the appellant. Under s. 55 of the Bankruptcy Act, 1883 (1), a lessor is not entitled to apply for an order vesting leasehold property, which has been disclaimed by the trustee in the bankruptcy of the

(1) Sect. 55 provides: (1.) "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

"Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2.) "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3.) "A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to

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lessee, in a sub-lessee of the original lessee subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date of the filing of the bankruptcy petition. Such an order cannot be forced on the sub-lessee against his will; it can only be made "in his favour," i.e., upon his applica-

be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just.

(4.) "The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it."

(6.) "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

"Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable, either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

(7.) "Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

tion. The original lessor is not a person who within the meaning of sub-s. 6 has an "interest in the disclaimed property;" i.e., in the lease; his interest is in the reversion. Nor is he within sub-s. 6 "entitled" to the property. The trust of the last day of the term in favour of the mortgagee is not affected by the disclaimer, for it is a trust estate. The bankrupt remains a trustee for the mortgagee, without any liability under the lease. The object of the section is to relieve the bankrupt's estate and the trustee from all liability under the lease. There is nothing in s. 55 to give to the lessor any rights which he had not before the disclaimer. He is not entitled to impose a vesting order on the mortgagee under the penalty of otherwise losing his security. The proviso to sub-s. 6 implies that the application for the vesting order is made by an under-lessee or mortgagee, and there is nothing to shew that an order can be made vesting the property in the lessor. Even if the mortgagee has, after the disclaimer, no interest in the nominal reversion of one day, the under-lease remains in force by virtue of sub-s. 2. Sect. 55 has adopted the decisions in *Ex parte Walton* (1) and *Hill* v. *East and West India Dock Company.* (2) If the mortgagee desired to have an assignment of the last day of the term, he could obtain it under the trust, but, if he does not want it, it cannot be forced on him. No harm will be done to the lessors. The registrar in making the order followed the decision of the Divisional Court in *Ex parte Shilson* (3), but that decision is not binding on this Court.

Another important question is, whether, if a vesting order is made, the mortgagee will be liable under the covenants of the original lease to the same extent as if he had been the original lessee, or only to the extent to which an assignee of the original lessee would be liable. In the latter case he could get rid of his liability by assigning the lease.

Millar, Q.C., and *J. E. Horne*, for the lessors. No doubt the Court will have to say whether *Ex parte Shilson* (3) was rightly decided. The order follows the exact words of sub-s. 6. It is said that such an order cannot be made on the application of the lessor, but only on the application of the mortgagee. There are

(1) 17 Ch. D. 746. (2) 9 App. Cas. 448.
(3) 20 Q. B. D. 343.

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three possible classes of persons who may be interested in leasehold property of a bankrupt: (1) persons claiming through or under the bankrupt, such as an under-lessee or a mortgagee by under-lease; (2) persons claiming side by side with the bankrupt, such as a surety for him for the performance of the lessee's covenants; (3) the lessor himself. Sect. 55 deals with the rights and liabilities of each of these classes. Sub-s. 2 deals with the effect of the disclaimer, and it clearly applies to the lessor. If sub-s. 2 stood alone, the disclaimer could not in any way affect the position of a sub-lessee or mortgagee by underlease. But sub-s. 2 deals only with the effect of the disclaimer itself. Sub-s. 6 deals with proceedings subsequent to the disclaimer, and it empowers the Court to make an order which may affect the position of an under-lessee or mortgagee by under-lease. The word "property" means the land which is the subject of the demise, and the lessor is clearly a person who has an interest in that. In the simple case of a lease being disclaimed by the trustee of the bankrupt lessee the Court would clearly have power to order possession of the property to be given to the lessor, without his being compelled to bring an action of ejectment. Under ss. 23 and 24 of the Bankruptcy Act, 1869, it was held that the lessor was a person "interested" in leasehold property which was disclaimed by the trustee of the bankrupt lessee: *Ex parte Lovering.* (1) There a landlord gave a notice, under s. 24 of the Bankruptcy Act, 1869, to the trustee in the bankruptcy of the lessee, calling on him to elect whether he would disclaim the lease. Such a notice could only be given by a person "interested in the disclaimed property."

[LORD ESHER, M.R. The point was not taken there.]

It never was taken under the Act of 1869.

[LINDLEY, L.J., referred to *In re Page.* (2)]

Ex parte Moore (3) was similar to *Ex parte Lovering.* (1) "Disclaimed property" refers to the demised house or land, not to a particular estate in it. Sub-s. 4 clearly applies to a lessor, and he is also within sub-s. 6. A vesting order, or an order for delivery of possession, may be made on his application. The proviso to sub-s. 6 is pointedly addressed to the position of an under-

(1) Law Rep. 9 Ch. 586. (2) 14 Q. B. D. 401.
(3) 2 Ch. D. 802.

lessee or mortgagee by demise from the bankrupt lessee. The words "in favour of" do not necessarily imply that a vesting order can be made only on the application of the mortgagee. He has an option; he need not take the lease unless he chooses to do so, but, if he will not take it, he is to forfeit his security. If he is recalcitrant, the lessor can set the Court in motion. Sect. 55 is an entirely new enactment, and this is its true construction. *Ex parte Shilson* (1) was rightly decided. If the mortgagee declines to accept a vesting order, then the property is "freed and discharged" from the mortgage, and the Court would then have power to make a vesting order in favour of any person liable side by side with the bankrupt, such as a surety. There is no such person in the present case, and (subject to the rights of subsequent mortgagees) the lessors would take the property free from the lease and the under-lease.

Gregory, in reply. The words of s. 55 are not plain, but its object was to prevent gross injustice in circumstances such as those which occurred in *Hill* v. *East and West India Dock Co.* (2) No injustice will be done to the lessors in the present case by refusing to make the vesting order. They are sufficiently protected by sub-s. 2. An under-lessee or mortgagee can only be forced to elect whether he will take a vesting order at the instance of a surety, or some other person who is liable to the lessor behind the bankrupt; the lessor cannot force him to elect.

The election of the mortgagee would depend very much upon whether he would be liable as original lessee or as assignee of the lease.

Cur. adv. vult.

1888. Aug. 3. LINDLEY, L.J., delivered the judgment of the Court (Lord Esher, M.R., and Lindley and Bowen, L.JJ.). He stated the facts, and continued:—The point which we have to decide turns on s. 55 of the Bankruptcy Act, 1883, which has replaced the provisions more or less to the same effect of s. 23 of the Bankruptcy Act, 1869, and has introduced a new method of dealing with onerous property. Sect. 55 is framed more or less upon the old lines, but it contains some clauses which are not to be found

(1) 20 Q. B. D. 343.

(2) 9 App. Cas. 448.

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in the old Act. It is important to bear that in mind in considering what weight ought to be attached to decisions upon the old Act. Sect. 55 is an entirely new enactment. The most material of the sub-sections are the 1st, the 2nd, and the 6th. The 1st provides that "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants . . . . " (the word "property" seems to be used there as denoting things rather than a legal conception), "the trustee, notwithstanding that he has endeavoured to sell, or has taken possession of the property, &c., may . . . disclaim the property." That enables the trustee to get rid of the property by disclaimer. Then sub-s. 2 says what the effect of the disclaimer is to be: "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt, and his property" (the word "property" there means, I take it, assets), "in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person." The effect of the disclaimer, speaking roughly and generally, is plain enough; it is to put an end to both the rights and the liabilities of the bankrupt and his trustee in respect of the disclaimed property. That is the primary object. By the disclaimer the trustee elects to have nothing to do with the property, which is onerous, and from which nothing can be got for the benefit of the creditors. He is at liberty to disclaim it, and the effect of the disclaimer is to extinguish all the rights and liabilities, both of the bankrupt and of the trustee himself. Then the last words shew that, notwithstanding that extinction of the rights and liabilities of the bankrupt and the trustee, the rights and liabilities of third persons are to remain untouched. Sub-s. 3 is immaterial for the present purpose. Sub-s. 4 is important for a reason which I will mention presently. It provides that "the trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any

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person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has, for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not." The importance of that sub-section is, that it contains the expression "any person interested in the property," and it was held by Cave, J., in *Ex parte Mackay* (1), that a lessor is a "person interested in the property," and is entitled, therefore, to call upon the trustee to disclaim. Then we come to sub-s. 6, which is the most important of all. It assumes that there has been a disclaimer, with the effects and consequences pointed out in sub-s. 2, and it proceeds to deal with the property, and to authorize the Court to make orders vesting it in other persons. Sub-s. 6 is itself subdivided into two clauses, the first of which provides that "the Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made the property comprised therein shall vest accordingly in the person therein named in that behalf, without any conveyance or assignment for the purpose." That is the general enabling clause as regards vesting orders. Then we come to a proviso applicable to leases: "Provided always, that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and

(1) 14 Q. B. D. 401.

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security upon the property, and, if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable, either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt." Then sub-s. 7 provides that "Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy." Now sub-s. 6 is extremely complicated, and, in order to see how it would work, it is necessary to go through it with some care. I will point out shortly how it works in two cases; first, in the case of a simple lease, and, secondly, in the case with which we have to deal, of a lease with a sub-demise by way of mortgage. The first matter to be considered is, in what sense the word "property" is used in s. 55, and, after studying the section with great care, it appears to me that the word is used in rather an inaccurate sense. It is sometimes used to denote the thing owned—the land or shares or whatever it may be; it is sometimes used to denote the bankrupt's interest in the thing, whatever it may be; and it is sometimes used, apparently indiscriminately, to denote both of those things. There is an ambiguity in the expression. But in some cases, for instance in sub-s. 1, it is obvious that "property" means the thing owned, be it land or shares or anything else.

The next point to be considered is, whether the lessor can be regarded as "a person claiming any interest in the disclaimed property" under sub-s. 6. Cave, J., in *Ex parte Turquand* (1) doubted whether a lessor came within that expression, but, in the more carefully considered case of *Ex parte Shilson* (2), the same learned judge, with the assistance of A. L. Smith, J., came to the conclusion that a lessor was "a person claiming an interest in the disclaimed property" within sub-s. 6. It is obvious that a lessor is very much interested in the observance by the lessee of the covenants and conditions contained in the lease, and that he has

(1) 14 Q. B. D. 405. (2) 20 Q. B. D. 343.

a very substantial "interest in the disclaimed property," in whatever sense you take the expression. After carefully considering the cases and the doubts expressed by Cave, J., in *Ex parte Turquand* (1) it appears to us that the view ultimately adopted by the Divisional Court in *Ex parte Shilson* (2) is correct, and that a lessor is "a person claiming an interest in the disclaimed property" under both sub-s. 6 and sub-s. 4.

Now the operation of those clauses in the simple case of a lease is not very difficult to ascertain. If there is nothing more than a lease, and the lessee becomes bankrupt, the disclaimer determines his interest in the lease under sub-s. 2. He gets rid of all his liabilities, and he loses all his rights by virtue of the disclaimer. There is no need of any provision for vesting the property in the landlord, but the natural and legal effect of sub-s. 2 is that the reversion will become accelerated. There is nothing that I can see to be vested in the landlord. But he may require delivery of possession, and, if so, he can get it under sub-s. 6.

Then, under sub-s. 7, the lessor, if he is injured by the disclaimer, can prove against the bankrupt's estate for such damages, if any, as he has sustained by the disclaimer. This is the operation of s. 55 in the simple case of a lease.

I have made these remarks by way of preface to the more complicated case with which we have now to deal—a lease and a sub-lease by way of mortgage. I will leave out for the present the fact that the sub-lease is by way of mortgage, and treat the case simply as one of a lease and sub-lease. This case resolves itself into two divisions. First, we will consider what is the result if the sub-lessee becomes bankrupt. In that event, as between the sub-lessee and the sub-lessor, the same consequences will follow as when there is only a lease and the lessee becomes bankrupt, but the original lessor will not be affected in any way.

Next we must consider the more complicated case of the original lessee becoming bankrupt, and we must consider it, first, as between him and his lessor. As between them the consequences will be the same if there were no sub-lease. As between the lessee and the sub-lessee the consequences will apparently be

(1) 14 Q. B. D. 405. (2) 20 Q. B. D. 343.

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these. The lessee's rights and interests and liabilities are determined under sub-s. 2, and the extinction of his rights involves the extinction of the liability of the sub-lessee under his covenants.

We must next consider the case as between the original lessor and the sub-lessee. Now their rights and liabilities are preserved by sub-s. 2, and, subject to the effect of a vesting order, whatever that may be, the case will stand in this way—the sub-lessee, although freed from his covenants to his own immediate lessor, must perform the covenants of the original lease or he will be liable to be distrained upon and to be ejected by the original lessor. That is obviously his position, and that was the position in which a lessee found himself, on the disclaimer of the lease by the trustee in the bankruptcy of his assignee, in *Hill* v. *East and West India Dock Co.* (1), under the Bankruptcy Act, 1869. That is by no means an enviable position, and it is a strange position in which to leave him. But the present Bankruptcy Act goes further. It does not stop with sub-s. 2, but sub-s. 6 has also to be considered. The sub-lessee can evidently apply under sub-s. 6 for an order vesting the lease in him; there is no controversy about that. But the question is, whether the lessor can apply for an order vesting the lease in the sub-lessee? It appears to us, for the reasons which I have already stated, having regard, that is, to the meaning of the word "property" and of the words "person claiming any interest in the disclaimed property," that the lessor can apply for such an order. But, whether the application is made by the sub-lessee or by the original lessor, in either case the vesting order can only be made in favour of the sub-lessee, subject to the covenants and conditions of the original lease, and, if the sub-lessee will not take the property on those terms, which, of course, he need not do, then these consequences appear to follow: First, the sub-lessee will be excluded from all interest in the disclaimed property. Whether the latter part of the proviso in clause 6 will apply will depend upon whether there is any such person as is there referred to. There may or may not be. If no vesting order is made, the lease will be determined under sub-s. 2, the sub-lease will be deter-

(1) 9 App. Cas. 448.

mined under sub-s. 6, and the lessor will take the property freed from both lease and sub-lease. This appears to us to be the logical consequence of the Act, and it is impossible not to see that it is a very startling result. It will very seriously affect the old practice of taking securities on leasehold property by way of sub-demise, the whole object of which was to prevent the mortgagee from becoming liable to the rent and to the covenants and obligations of the original lease. If the decision of the Divisional Court in *Ex parte Shilson* (1) is right, as we think it is, this anomaly will be introduced into the practice of conveyancing in the event of the bankruptcy of a mortgagee of leasehold property by sub-demise.

There is another question of considerable difficulty, which it is not necessary for us now to decide, viz., whether, assuming that an order is made vesting the property in the mortgagee, he will become liable to the covenants and obligations of the original lease only as an assignee of the lease, or to the same extent as if he were the original lessee. This is an extremely important question, and it is not altogether free from difficulty. It is obvious that the vesting order alone would impose upon the person who takes the property under it all the obligations and all the rights of a mere assignee of the lease. The provision in sub-s. 6 that "where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed," looks as if it was intended to impose upon the person taking the property under the vesting order some additional liability. But this point has not been fully discussed, and, having drawn attention to it as an extremely important matter, quite as important perhaps as any other which arises under this section, we leave it for the present.

We think that the decision of the registrar was right; in other words, we are of opinion that the decision of the Divisional Court in *Ex parte Shilson* (1) has correctly interpreted this section,

(1) 20 Q. B. D. 343.

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although it is attended with very startling consequences. The result is that this appeal must be dismissed with costs.

Appeal dismissed.

THE COURT gave leave to appeal to the House of Lords.

Solicitors for appellant: *Hanbury, Hutton, & Whitting.*
Solicitor for respondents: *W. T. Bloxam.*

W. L. C.

Aug. 2, 3.

[IN THE COURT OF APPEAL.]

BRERETON *v.* EDWARDS.

Practice—Charging Order—Jurisdiction—Order charging Cash—Cash standing to credit of Debtor in Chancery Division—Priority—Stop Order—Date from which Charging Order takes effect—1 & 2 *Vict. c.* 110, *ss.* 12, 14—3 & 4 *Vict. c.* 82, *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Rules of Supreme Court*, 1883, *Order* XLVI., *rr.* 1, 3—*Supreme Court Funds Rules*, 1886, *r.* 99.

A charging order may be made by a judge of the Queen's Bench Division upon cash standing to the credit of the debtor in the Chancery Division in the name of the Paymaster-General.

Such an order may be made ex parte, and in order to give effect to it it is not necessary to obtain a stop order or to obtain the appointment of a receiver; but notice given to the Paymaster-General will be sufficient to secure priority.

A charging order nisi, when it is afterwards made absolute, takes effect from the date of the order nisi.

Decision of the Queen's Bench Division (ante, p. 226) affirmed on different grounds.

APPEAL by the guardians of the Congleton Union against the refusal (ante, p. 226) of a Divisional Court (Lord Coleridge, C.J., and Mathew, J.) of an application by the guardians to set aside a charging order made by Field, J., in chambers. The facts are stated in the judgment in the Court below, but, in consequence of the additional points argued in the Court of Appeal, it is necessary to state them more in detail.

On January 26, 1888, the plaintiffs recovered judgment in the Queen's Bench Division against the defendant for 48*l.* At this time there was standing to the credit of the defendant in the Chancery Division of the High Court in an administration action

entitled *In re Joseph Edwards, deceased, Edwards* v. *Edwards*, in the name of the Paymaster-General, a sum of 65*l.* 12*s.* 3*d.* cash, being the balance of a sum of 111*l.* 9*s.* 4*d.*, representing the share of the defendant Henry Edwards in the residuary estate of Joseph Edwards, deceased, which, by an order made in the administration action on January 29, 1886, had been directed to be paid to the defendant Henry Edwards. This sum was part of the proceeds of the sale of a sum of consols, which had been sold for the purpose of division among the persons entitled thereto. On January 26, 1888, upon the application of the plaintiffs, Brereton and his wife, Field, J., made an order nisi, charging the defendant's interest in the 65*l.* 12*s.* 3*d.* with the payment of the 48*l.* due on the judgment. On January 31, 1888, the order nisi was made absolute. Notice of the order nisi was given to the Paymaster-General, but the plaintiffs did not obtain a stop order on the fund.

On January 27, 1888, upon the application of the guardians by summons in the administration action, an order was made that, out of the 65*l.* 12*s.* 3*d.* standing to the credit of Henry Edwards, a sum of 14*l.* 12*s.* should be paid to the guardians in respect of an amount expended by them in the maintenance of Edwards and his children as paupers, and their costs of the application. This order was not passed and entered until March 2. The Paymaster-General declined to act upon the order, because he had received notice of the charging order in favour of Brereton and his wife.

The Divisional Court refused to set aside the charging order, or to order that, notwithstanding it, the 14*l.* 12*s.* should be paid to the guardians out of the 65*l.* 12*s.* 3*d.*

The guardians appealed.

Horace Avory, for the appellants. First, there is no power under 1 & 2 Vict. c. 110 (1) to make a charging order upon

(1) By Order XLVI., r. 1: "An order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1." By Order XLVI., r. 3: "The expression 'stock' includes shares, securities, and money."

By 1 & 2 Vict. c. 110, s. 12: "By

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cash; the power is limited to Government stock and funds, and stock and shares of a public company, and the dividends, interest, or annual produce thereof: *Dixon* v. *Wrench*. (1) There is no power to make a charging order, except the statutory power: Daniel's Chancery Practice, 6th ed., vol. i., p. 937. The Court of Chancery had no original jurisdiction to make charging orders or garnishee orders: *Horsley* v. *Cox* (2); *Stevens*

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virtue of any writ of fi. fa. . . . the sheriff . . . . may and shall seize and take any money or bank notes . . . . and any cheques . . . . belonging to the person against whose effects such writ of fi. fa. shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized or a sufficient part thereof; and may and shall hold any such cheques . . . . as a security or securities for the amount by such writ of fi. fa. directed to be levied, or so much thereof as shall not have been otherwise levied or raised."

Sect. 14: "If any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England . . . . standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon."

By 3 & 4 Vict. c. 82, s. 1: "The aforesaid provisions of the said Act" (i.e. 1 & 2 Vict. c. 110, s. 14) "shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well as in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities or shares."

By the Supreme Court Funds Rules, 1886, r. 99: "The paymaster, upon a request signed by or on behalf of a person claiming to be interested in any funds in Court standing to the credit of an account specified in such request, may, in his discretion, issue a certificate of the amount and description of such funds, and such certificate shall have reference to the morning of the day of the date thereof, and shall not include the transactions of that day, and the paymaster shall notify on such certificate the dates of any orders restraining the transfer, sale, delivery out, or payment, or other dealings with the funds in Court to the credit of the account mentioned in such certificate, and whether such orders affect principal or interest, and any charging orders, affecting such funds, of which respectively he has received notice, and the names of the persons to whom notice is to be given, or in whose favour such restraining or charging orders have been made."

(1) Law Rep. 4 Ex. 154.

(2) Law Rep. 4 Ch. 92, 97.

v. *Phelips*. (1) The form of order charging cash given in Seton on Decrees, 4th ed., vol. i., p. 305, is placed under the heading of "Orders on Funds and Shares under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82," and it has not been followed in practice.

Secondly. At any rate, the charging order did not take effect till it was made absolute, and before that had been done the order for payment to the guardians had been made: *Warburton* v. *Hill* (2); *Howell* v. *Metropolitan District Railway Co.* (3) The plaintiffs could not obtain priority by the charging order alone; it was necessary, also, to obtain a stop order: *Watts* v. *Jefferyes* (4); *Warburton* v. *Hill* (2); *Hopewell* v. *Barnes* (5); *Mutual Life Assurance Society* v. *Langley* (6); *In re Bell.* (7)

Thirdly. The proper mode of obtaining equitable execution is by the appointment of a receiver: *Webb* v. *Stenton.* (8) *Salt* v. *Cooper* (9) was only a decision that a receiver could be appointed in an action in which the writ was not indorsed with a claim for a receiver, and that it was not necessary to commence a fresh action. The charging order cannot be treated as equivalent to the appointment of a receiver, or as anything but what it purports to be. Sect. 24 of the Judicature Act does not empower the Court to do all that may be necessary to enable a creditor to realize his judgment; an order for the sale of shares, upon which a charging order has been made, cannot be made without a fresh action: *Leggott* v. *Western.* (10)

Ince, Q.C., and *E. Brodie Cooper*, for the plaintiffs. Either under the statutes, or by virtue of the ordinary jurisdiction of the Court of Chancery, there was power to make an order charging cash. The Court of Chancery used to give effect by means of equitable execution to the judgments and orders of the Common Law Courts: *Watts* v. *Jefferyes.* (11)

The Act 3 & 4 Vict. c. 82, goes further than the former Act, and extends to money arising from stock or shares to which the judgment debtor was entitled. In the present case stock, which

(1) Law Rep. 10 Ch. 417.
(2) Kay, 470.
(3) 19 Ch. D. 508.
(4) 3 Mac. & G. 372.
(5) 1 Ch. D. 630.
(6) 32 Ch. D. 460.
(7) 34 W. R. 363.
(8) 11 Q. B. D. 518.
(9) 16 Ch. D. 544.
(10) 12 Q. B. D. 287.
(11) 3 Mac. & G. 422.

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represented the residue of an estate, was turned into money only for the purpose of division among the persons entitled to it. The form given in Seton is a precedent for making an order charging cash under the control of the Court. Before the Judicature Act, as is shewn by *Watts* v. *Jefferyes* (1), the Court of Chancery would aid the process of the Common Law Courts; à fortiori, such assistance will be given now. The plaintiffs' order was first in date, and it is clear that the Paymaster-General had notice of it first, because it was on that ground that he declined to act upon the order for payment to the guardians.

When a charging order nisi is made absolute it takes effect as from the date of the order nisi: *Haly* v. *Barry*. (2)

It is not necessary under the present practice to obtain a stop order; the charging order nisi was sufficient of itself for that purpose: Supreme Court Funds Rules, 1886, r. 99.

The plaintiffs' order did not take effect till it was drawn up on March 2: Order XLI., r. 4; and that was after the charging order had been made absolute.

[They also referred to *Smith* v. *Cowell* (3) and *Westhead* v. *Riley*. (4)]

Avory, in reply. The order obtained by the appellants is dated January 27, though it was not drawn up till March 2.

The order nisi could only have been obtained under the statute, and the plaintiffs, having obtained an order in that way, cannot afterwards change their ground and rely upon the order as one made under the equitable jurisdiction of the Court. Under that jurisdiction such an order could have been obtained only by summons upon notice.

Rule 99 of the Supreme Court Funds Rules, 1886, only makes it the duty of the Paymaster-General to notify on any certificate, which he may give of the amount of the funds standing to the credit of any person, any charging orders affecting such funds of which he has received notice.

LORD ESHER, M.R. We have come to the conclusion that we must affirm the decision of the Divisional Court. The Divisional

(1) 3 Mac. & G. 422.
(2) Law Rep. 3 Ch. 452.
(3) 6 Q. B. D. 75.
(4) 25 Ch. D. 413.

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Court were asked to set aside the charging order made by Field, J., on the ground that he had no jurisdiction to make it, because the fund which the order purported to charge was money in the hands of the Paymaster-General, and it was said that the learned judge had no power to make an order charging money. That was the ground of the appeal, but there was an alternative application for a declaration that, even if the charging order was rightly made, the guardians were entitled to payment of the sum of 14*l.* 12*s.* out of the fund in Court, in accordance with the order of the Chancery Division, on the ground that that order had priority over the charging order.

The main question, therefore, is, whether Field, J., had jurisdiction to make the charging order.

In the Divisional Court it was argued that there was jurisdiction to make the charging order under s. 14 of 1 & 2 Vict. c. 110, combined with s. 1 of 3 & 4 Vict. c. 82. In answer to this it was said that s. 14 does not apply to money—that it applies only to Government stock, funds or annuities, and stock or shares in a company—and that the same difficulty exists with regard to s. 1 of 3 & 4 Vict. c. 82. In my opinion the appellants' argument on this point is well founded, and the present case cannot be brought within either of those sections. But then it was said on behalf of the respondents that it is not necessary to vouch those sections, and that the order of Field, J., could be maintained by the aid of s. 12 of 1 & 2 Vict. c. 110, in conjunction with the jurisdiction which the Court of Chancery exercised before the Judicature Act.

In the present case the execution creditors had obtained a judgment against the execution debtor in the Queen's Bench Division, and they applied to Field, J., in chambers for a charging order upon money which was standing to the debtor's credit, in the name of the Paymaster-General in an action in the Chancery Division, in order to assist the creditors in obtaining the fruits of their judgment out of that money. If the money had been in the debtor's own drawer it is clear that, by virtue of s. 12 of 1 & 2 Vict. c. 110, the sheriff could have seized it under the fi. fa. Then arises the question, whether the Chancery Division will by any, and, if so, by what, process, assist a creditor, who

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has obtained a judgment in the Queen's Bench Division, to obtain the fruits of his judgment out of money standing to the credit of the debtor in an action in the Chancery Division?

The case of *Watts* v. *Jefferyes* (1) seems to me to shew that the Court of Chancery would formerly have given assistance of that kind to a judgment creditor. In that case a cheque, drawn by the Accountant-General of the Court of Chancery in favour of the debtor, was in the hands of the Accountant-General. If the cheque had not been in the hands of the officer of the Court, the sheriff could, by virtue of s. 12, have seized it under the fi. fa., and Lord Truro, L.C., held that the Court ought to allow the sheriff to seize the cheque, which must be considered as belonging to the judgment debtor, on the principle that, when the Court had in its possession a thing which would otherwise have been liable to seizure under a fi. fa., the Court ought to assist the creditor to obtain the fruits of his judgment by means of it. It appears to me that the same principle applies to money in the hands of the Paymaster-General under the control of the Chancery Division. When the Court of Chancery and the Courts of Common Law were distinct Courts it appears that the Court of Chancery would have given this assistance to the process of a Common Law Court. The Judicature Act has made all the judges of the High Court judges of all the Divisions; they are all now parts of one and the same Court. It seems to me, therefore, that Field, J., stood in the same position as if he had been a judge of the Chancery Division, and that he was entitled to make the charging order to assist the creditor in realizing his judgment.

Then arises the question, in what form ought Field, J., to have made the order? Was he bound to go through the ceremony of appointing a receiver, or was he entitled to make a charging order directly in favour of the creditor? Was he bound to make an order that the sheriff should apply to the Chancery Division? In my opinion, both those steps would have been a mere waste of time and money. I think the judge had jurisdiction to make the charging order at once.

Then it is said that, the application being made to him under 1 & 2 Vict. c. 110, Field, J., ought to have insisted upon the

(1) 3 Mac. & G. 422.

applicants taking out a summons and serving it on some one. It may be that there has been some irregularity in practice, but it does not affect the jurisdiction to make the order. This objection ought to have been taken before Field, J., but it was not. I think it cannot be taken now, and the order, which there was jurisdiction to make, cannot now be set aside on this ground.

Then comes the question, from what date does the charging order take effect? The order nisi was made on January 26; the order in the administration action for payment to the guardians was not made till January 27, and it was not drawn up till March 2. The charging order was made absolute on January 31, that is, after the making of the other order. Does the charging order take effect as from January 26, when the order nisi was made, or as from January 31, when the order nisi was made absolute? It seems to me that this point is determined by *Haly* v. *Barry*. (1) The question was there raised, whether a charging order took effect from the making of the order nisi or from the time when it was made absolute, and the decision of Page Wood, L.J., when Vice-Chancellor, in *Warburton* v. *Hill* (2) was cited as shewing that the order took effect only from the date of the order absolute. The Lords Justices (Page Wood and Selwyn), however, held that the order operated from the making of the order nisi. And, in the course of his judgment, Page Wood, L.J. (3), said (referring to *Warburton* v. *Hill* (2), "I there used expressions which were not necessary to the decision, and which I am inclined to think erroneous. The statute directs the judge to make an order nisi. If sufficient cause is shewn against it it falls, but if not, it remains in force, and in the meantime it is operative, taking the fund out of the control of the debtor, and the only question remaining is, whether any sufficient cause can be shewn against making it absolute. I do not think that a subsequent decree for administration is a sufficient cause." And Selwyn, L.J., said (3), "The question turns upon this, whether the charging order is to be considered as one or two. It has been urged that there are two orders, and that the first goes for nothing unless followed by the other. The language of the Act appears to me quite opposed

(1) Law Rep. 3 Ch. 452. (2) Kay, 470.
(3) Law Rep. 3 Ch. at p. 457.

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to this view; it speaks of one order which is at first an order nisi, and is afterwards made absolute." That decision seems to me to amount to this, that the order nisi is the charging order, but that it stands in abeyance until it is made absolute. When, however, it is made absolute the order nisi is the charging order, and it takes effect from the date when it was originally made. The result of this is, that the plaintiffs' charging order is prior in date to the order for payment to the guardians.

Was it then necessary that the plaintiffs should obtain a stop order to render the charging order effectual? In former times I think it would have been necessary; but the effort in recent times has been to get rid of every unnecessary step, and thus to diminish the expense of litigation. After a charging order nisi has been made and notice has thereby been given to the Paymaster-General, a stop order would be a merely useless piece of machinery, and, having regard to r. 99 of the Supreme Court Funds Rules, 1886, I think it is no longer necessary. Stop orders are still required in some cases, but not in the case of a charging order. The appeal must, therefore, be dismissed.

I wish to add that the form of charging order given in Seton on Decrees, which has been referred to, is in accordance with our present decision. I believe it has not been followed in practice, but that charging orders on cash have been generally limited to cash the proceeds of the stocks, funds, and shares mentioned in s. 14 of 1 & 2 Vict. c. 110. But the grounds of our judgment are not limited to the proceeds of such stocks, funds, and securities, and there need be no flinching from making a charging order in the Chancery Division with regard to any cash, when a creditor has obtained judgment for his debt, and the order is in the nature of an equitable execution in aid of the judgment.

LINDLEY, L.J. I am of the same opinion. The question is whether the charging order nisi can be maintained, and, if so, what is the effect of it. Both these points are important.

The first question is, whether there is any mode of procedure by which a judgment creditor can obtain a charge upon cash standing to the credit of the judgment debtor in the Chancery Division. Reliance was placed upon s. 14 of 1 & 2 Vict. c. 110, and s. 1 of

3 & 4 Vict. c. 82, but those sections are confined to stock and shares and the dividends and interest of stock and shares; they do not apply to cash generally. Is there any other method by which a judgment creditor can obtain a charge upon cash belonging to the judgment debtor? The law upon the point is somewhat peculiar. Before the Act 1 & 2 Vict. c. 110, the sheriff could not under a writ of fi. fa. seize either cash or cheques belonging to the execution debtor, but by s. 12 of that Act power was given to the sheriff to seize both cash and cheques. In *Watts* v. *Jefferyes* (1) Lord Truro, L.C., acting, not under the Act, but by analogy to it, held that the Court of Chancery ought not to prevent the sheriff from seizing under a fi. fa. a cheque which the Accountant-General of the Court had drawn in favour of the judgment debtor, and which was then in the Accountant-General's hands. That case goes a very long way, for it shews that, when there was property of a judgment debtor which could be seized under a fi. fa., that property could be reached by the judgment creditor, although it was in the custody of the Court of Chancery. After consulting our colleagues in the other division of this Court, we think that there is no reason in principle why cash standing to the credit of a judgment debtor in the Chancery Division should not be handed over to his judgment creditor, there being no authority or practice to the contrary. I think, therefore, that the order of Field, J., was right in substance, though it could not be made under the statutory power under which it purports to have been made. I doubt whether he would have made the order if he had not thought that he was acting under the authority of the statute; but it cannot be said that he had no jurisdiction to make it.

The next question is, whether the charging order has priority over the order for payment to the guardians, and I think it has. From what date does the charging order take effect? *Haly* v. *Barry* (2) shews that the effect of the two orders—the order nisi and the subsequent order absolute—was to charge the fund as from the date of the order nisi, and I can see no difference in principle for this purpose between a charging order made under the statutory power, and a similar order made under the general

(1) 3 Mac. & G. 422. (2) Law Rep. 3 Ch. 452.

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jurisdiction of the Court. The charging order, when it was made absolute, related back to the date of the order nisi. That order was in effect a charging order made ex parte.

This disposes of all the points in the case, except the question whether the plaintiffs ought to have obtained a stop order. Under the old practice I think a stop order would have been necessary. But, looking at the recent changes in the practice, and especially having regard to the Supreme Court Funds Rules, 1886, it is manifest that some duties have now been cast on the Paymaster-General far in excess of those which were formerly cast upon the Accountant-General of the Court of Chancery. Under r. 99 it is plainly the duty of the Paymaster-General to take notice of charges upon a fund in Court which have been properly notified to him. If this be so, what is the use of obtaining a stop order? It appears to me that in a case of this kind a stop order would be useless. When a charging order has been made, and notice of it has been given to the Paymaster-General, it would be a mere waste of time and money to obtain a stop order.

BOWEN, L.J. I think the broad principle of law which we are now deciding is this—that any judge of the High Court has power, at the instance of a judgment creditor, to make an effectual order charging the judgment debt upon a sum of money standing to the credit of the judgment debtor in the name of the Paymaster-General in an action in the Chancery Division. I think that this follows as the true effect of the Act 1 & 2 Vict. c. 110, which is a most important step in the history of our law. One object of that Act was to "abolish arrest on mesne process in civil actions, except in certain cases, and to extend the remedies of creditors against the property of debtors." At the time when that Act was passed nothing could be taken in execution by the sheriff under a fi. fa. which could not be sold; such things as cheques and money could not be taken. But s. 12 of the Act empowered the sheriff to seize money, bank notes, cheques, and many other things, belonging to the judgment debtor. By s. 14 a further attempt was made to follow the property of a judgment debtor. It enabled the Courts of common

law to make a charging order upon property which could not be taken under the writ, and to which s. 12 did not apply. The Act 3 & 4 Vict. c. 82, by s. 1, carried the provisions of s. 14 still further. But still a considerable amount of imperfection was left in the remedy of an execution creditor. On the one hand, a Court of Common Law could not make an order charging cash belonging to the judgment debtor which was in the hands of a Court of Equity, or, indeed, charging any cash at all. In *Robinson* v. *Peace* (1) it was held that money deposited by a company in the hands of a third party for the use of the defendant, against whom judgment had been recovered by the plaintiff, could not be charged under s. 14 of 1 & 2 Vict. c. 110, or seized under s. 12. On the other hand, a Court of Equity could not avail itself of s. 14 to make a charging order under the statute. What, then, did the Act 1 & 2 Vict. c. 110, enable a Court of Equity to do? Sect. 12 made cheques and money available for execution, and, by analogy, it enabled a Court of Equity to assist a judgment creditor, by means of equitable execution against money belonging to him in its own hands. *Watts* v. *Jefferyes* (2) shews that a Court of Equity would aid a judgment creditor in that way. But still this difficulty remained, that a Common Law Court could not make an order charging cash in the hands of the Court of Chancery. This relief was finally given by the Judicature Act, which placed all the judges of the High Court in the same position. A judge of the Chancery Division can now make an order charging a judgment debt upon stock or shares belonging to the judgment debtor, and a judge of the Queen's Bench Division can charge cash under the control of the Chancery Division.

But the question still remains, in what mode is equitable execution to be given to a judgment creditor as regards cash standing to the credit of the judgment debtor in the Chancery Division? It has been suggested that this can be done only by means of the appointment of a receiver. That would be the merest formality, when such an appointment would be useless or worse than useless. What could be the use of appointing a receiver of money which was already in the hands of the Court?

(1) 7 Dowl. (Prac. Cas.) 93. (2) 3 Mac. & G. 422.

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In my opinion a charging order is quite sufficient, without the appointment of a receiver.

There are several points still to be considered. It is said that an order nisi ought not to have been made by Field, J., and I am by no means clear that it is always necessary to make an order nisi as regards cash. I can conceive cases in which it might be desirable to make an order nisi, and others in which it might not. I regard the order of Field, J., as an order ex parte in the first instance; an order nisi is strictly applicable only to a case which comes within the statute. But it seems to me clear that Field, J., had jurisdiction to make the order nisi in the first instance, though it might have been more expedient not to do so, and, if he had jurisdiction, then *Haly* v. *Barry* (1) shews that the order absolute, when it is made, relates back to the date of the order nisi.

Then it is said that the charging order ought to have been followed by a stop order, and, no doubt, in some cases a stop order is very valuable, but I cannot see the use of it after a charging order has been made. At any rate, since r. 99 of the Supreme Court Funds Rules, 1886, it is clear that a stop order is no longer necessary in such a case. The charging order is effectual of itself, and it operates from the date of the order nisi.

Appeal dismissed.

Solicitors for appellants: *Hicklin, Washington, & Pasmore.*
Solicitors for respondents: *Scott, Jarmain, & Co.*

(1) Law Rep. 3 Ch. 452.

W. L. C.

WOOD *v.* THE EARL OF DURHAM. 1888 Aug. 9.

Practice—Pleading—Defence—Libel—Evidence of Plaintiff's bad Reputation—Facts on which Defendant relies for Defence—Defence or Denial as to Damages—Rules of Supreme Court, 1883, *Order* XIX, *rr.* 4, 15; *Order* XXI., *r.* 4.

The plaintiff, a professional jockey, sued to recover damages for a libel charging him with unfairly and dishonestly riding the horses in a particular stable.

The defendant pleaded a justification, and afterwards applied to amend his defence by adding a paragraph alleging that at the date of the publication the plaintiff was commonly reputed to have been in the habit of unfairly and dishonestly riding horses in races, so as to prevent them from winning:—

Held that, as general evidence of the plaintiff's bad reputation (if admissible) could only be given in reduction of damages, and not in answer to the action, the paragraph did not contain a statement of material facts on which the defendant relied for his defence, within the meaning of Order XIX., r. 4, or a ground of defence which must be raised under Order XIX., r. 15, but was a denial or defence as to damages claimed or their amount, within the meaning of Order XXI., r. 4, and therefore ought not to be pleaded, and leave to amend must be refused.

APPEAL by the defendant in an action for libel from the order of Charles, J., affirming the order of the master, who had refused leave to amend the defence by adding a paragraph.

The statement of claim was as follows:—

(1.) "The plaintiff is and was at the time of the publication hereinafter mentioned a professional rider and jockey, and the defendant is and was at the time of the said publication a member of the Jockey Club.

(2.) "On or about the 7th February, 1888, the defendant falsely and maliciously wrote and published of the plaintiff, and of him in his calling as a professional jockey, the words following, that is to say: 'I now state that the substance of my speech at the Gimcrack dinner at York,' meaning thereby a speech made by the defendant, 'was to the effect that the horses in Sherrard's stable have shewn constant and inexplicable changes of form, and that Wood' (meaning the plaintiff), 'the jockey of that stable, has been in the habit of pulling them,' meaning thereby that the plaintiff by unfair and dishonest riding had prevented the said horses from winning races which, but for such unfair

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and dishonest riding, they would have won, and had thereby caused them to shew uncertain and variable quality in their racing.

(3.) "By reason of the premises the plaintiff has been greatly injured in his professional credit and reputation, and has been exposed to contempt and hatred, and has suffered great mental pain and distress."

The defence admitted the allegations in paragraph 1 of the statement of claim, and the publication of the words set out in paragraph 2, but denied the meaning therein alleged, and stated that the words without such meaning were true in substance and in fact.

The defence also contained this statement: "If the said words were published with the meaning alleged in the statement of claim, they are with the said meaning true in substance and in fact."

The paragraph which the defendant sought to add to the defence was as follows:—

"At the date of the publication in the statement of claim mentioned the plaintiff was commonly reputed to have been in the habit of so unfairly and dishonestly riding race-horses in horse races as to prevent them from winning races, which but for the plaintiff's unfair and dishonest riding they would have won."

J. Lawson Walton, (*Sir Charles Russell, Q.C.*, with him), for the defendant. The paragraph which it is sought to add to the defence states material facts, within the meaning of Rules of Supreme Court, 1883, Order XIX., r. 4; and further, it states matters which, if not raised, would be likely to take the opposite party by surprise, within the meaning of Order XIX., r. 15, and which, therefore, ought to be pleaded. The expression "material facts," in Order XIX., r. 4, includes all facts which can be given in evidence at the trial, and it is clear that the defendant is entitled to give general evidence of reputation for the purpose of shewing that the plaintiff did not bear such a character as would suffer from the publication of the libel: *Scott* v. *Sampson*. (1) The only alteration in the practice since that decision is by Order XXI., r. 4; but that rule does not affect the present point.

(1) 8 Q. B. D. 491.

Formerly this evidence would have been admissible under the plea of "not guilty"; but now, by the rules already referred to, the facts must be pleaded: *Scott* v. *Sampson*, per Cave, J. (1) If the plaintiff succeeds here he may object at the trial that the evidence is inadmissible because the defendant has not pleaded what he seeks to prove. Order XXXVI., r. 37, does not apply, because a justification is pleaded. Matters which tend to aggravate or mitigate the damages are "material facts," and should be pleaded: *Millington* v. *Loring* (2); *Lumb* v. *Beaumont*. (3) The application to amend was made before reply, so no injury can be done to the plaintiff, and therefore leave should be given: *Tildesley* v. *Harper*. (4)

Sir Henry James, Q.C., and *Alfred Lyttleton* (*Lockwood, Q.C.*, with them), for the plaintiff. The order of Charles, J., is right. According to the old practice there was no such thing as pleading to damages, and there is nothing in the rules or decisions referred to which shews that this has been altered. *Millington* v. *Loring* (5) only decided that matter of aggravation could be inserted in the statement of claim, and is no authority for the proposition that a defendant is entitled to plead matters which, if admissible in evidence at all, could only be so as affecting the amount of damages. This contention is directly contrary to the express provision of Order XXI., r. 4, that "no denial or defence shall be necessary as to damages claimed or their amount." The proposed paragraph does not state "material facts on which the party pleading relies for his defence," within the meaning of Order XIX., r. 4, for if all that it alleges is proved the plaintiff will still be entitled to a verdict unless the justification is established. The defendant is, in effect, asking for a decision that the proposed evidence is admissible. That point is not now before the Court, but will have to be dealt with at the trial.

Walton replied.

MANISTY, J. This is an appeal from a decision of my brother Charles affirming the decision of the master. The application

(1) 8 Q. B. D. at p. 503.
(2) 6 Q. B. D. 190.
(3) 49 L. T. (N.S.) 772.
(4) 10 Ch. D. 393.
(5) 6 Q. B. D. 190.

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was by the defendant to add a paragraph to the statement of defence. Now the statement of claim is very specific. The plaintiff is a professional jockey, and the defendant is a member of the Jockey Club, and the alleged libel is in these words: "I now state that the substance of my speech at the Gimcrack dinner at York," meaning thereby a speech made by the defendant, "was to the effect that the horses in Sherrard's stable have shewn constant and inexplicable changes of form, and that Wood, the jockey of that stable, has been in the habit of pulling them." That is all confined to the horses in that stable. Then comes the innuendo. "Meaning thereby that the plaintiff by unfair and dishonest riding had prevented the said horses" (that is in Sherrard's stable) "from winning races which, but for such unfair and dishonest riding, they would have won, and had thereby caused them to show uncertain and variable quality in their racing." This refers only to Sherrard's stable, and the horses of that stable. The defence is this: The defendant admits that he published the words, but he denies that he did so with the meaning alleged; he says the words without the meaning are true; then comes this: "In the alternative the defendant says that if the words were published with the meaning alleged in the statement of claim they are with the said meaning true in substance and in fact." Let us now see what it is which the defendant seeks to add. "At the date of the publication in the statement of claim mentioned the plaintiff was commonly reputed to have been in the habit of so unfairly and dishonestly riding race-horses in horse races as to prevent them from winning races which, but for the plaintiff's unfair and dishonest riding, they would have won." What is that? It is this: "I do not say it is true he did that with respect to Sherrard's stable, or the horses in Sherrard's stable, but, whether that be true or no as to those particular horses, he had a bad reputation as to horses generally." It is one of the widest and, to my mind, most extraordinary attempts at a sort of justification that I have ever seen. "You allege that I was guilty of unfair practices with respect to particular horses." "I say, whether that is true or not, you had a bad reputation as to other horses." Even if it could be contended that it would be a good and admissible plea to say, "You had a

bad reputation as to those horses," yet see what an issue it raises, "whether you did that or not you did something else, you rode some horses in some races unfairly." I believe I might stop at that point, but even if it could be admitted with respect to the particular matter alleged, it is perfectly out of all reason to let the defendant set up general reputation as to unfair riding. The jury, I suppose, ought to come to the conclusion that, because he was unfair in riding some other horses, they ought to find him guilty of riding unfairly in riding these horses. Passing that by, it seems to me that we should be introducing, by allowing it even in a limited form, a new system and a new state of things.

But it is argued for the defendant that a new state of things has arisen by reason of the new rules, and that if it is intended to rely upon particular facts, even although it be a mere question of damages, all the facts upon which it is intended to rely with respect to character must be stated. No doubt the case of *Millington* v. *Loring* (1) seemed at first to contain dicta which justified this argument, but having considered the decision, I come to the conclusion that in that case there was a good cause of action of a double character stated. In that case there were damages claimed by reason of an alleged breach of promise of marriage, but there was far more, because part of the cause of action no doubt was that by reason of that the plaintiff had been ill through the seduction by the defendant, who had ruined her character, and had infected her with a bad disease. That seems to me to be the solitary ground for saying that that case is no authority for the argument in support of adding this plea. I think that case is no authority as having any real bearing upon this case when it is considered. See what the argument comes to. In every case of slander or libel the defendant, without justifying that the words published were true in substance and in fact, may say that whether they were or not the plaintiff had a bad reputation. I admit if it goes to damages owing to good character, in certain cases and within certain limits it may be that evidence may be admissible to rebut the statement, but then it must have reasonable limits, and must be dealt with in the way in which it always has been dealt with, as

(1) 6 Q. B. D. 190.

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far as my experience goes, and not by way of plea in answer to the action. Order XIX., r. 4, provides that all material facts shall be pleaded. That means, to my mind, material to the claim or to the defence. There is also to be no defence as to damages. That is by Order XXI., r. 4: "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases," but, of course, subject to the rules of evidence and to the law with regard to the admissibility of evidence. I do not think that Order XIX., r. 4, as to pleading material facts, was ever intended to interfere with Order XXI., r. 4. That is the main point, no doubt, and it was urged that the two orders have to be taken together, and, therefore, as to damages, everything must be stated which it is intended to rely upon. I do not think that is a proper construction of the rules, and it comes therefore to what was contended for the plaintiff, that if this is pleaded evidence could not be admitted, and if evidence could not be admitted it ought not to be pleaded. I am very much inclined to think that is correct, but, for the reasons which I have already given, it seems to me that this goes beyond anything which has ever been suggested. It would simply exclude a man from his remedy for damages for a particular libel, by saying he has done something else, which is a sufficient answer to the action, or, at all events, would disentitle him to damages.

I think this appeal must be dismissed with costs.

HAWKINS, J. I am of the same opinion. Order XIX., r. 4, is thus framed: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence," and so on. Rule 15 of Order XIX. seems to me not to carry the case further: "The defendant . . . . must raise by his pleading all matters which show the action . . . . not to be maintainable, or that the transaction is either void or voidable in point of law; and all such grounds of defence . . . . as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings."

This action is for libel, and the defendant says that the words contained in the libel are true in substance and in fact. There are issues raised, and it is on the determination of those issues that the verdict will depend. The defendant wants to add a further paragraph, which does not go to the cause of action, and which does not go to the defence, but which it is said goes to damages. It is an allegation which may be called a plea, in one sense, but certainly not in the true sense of that term. It is not that which goes to the cause of action at all, but simply, if established, is said to go in mitigation of damages. That is perfectly certain. If the evidence which is proposed to be given could be admissible under any circumstances in support of the defence of justification, or if it could be admissible in respect of the cause of action, for the purpose either of supporting or defeating the cause of action, I should be very strongly inclined to admit the evidence; but the evidence proposed to be given would not be admissible by way of defence to the action, and, if offered at all, it could be only offered in mitigation of damages. The case, therefore, clearly does not fall within Order XIX., r. 4, which provides that there shall be a statement of the material facts on which the party relies for his claim or defence. It certainly does not fall within that; nor does it to my mind fall within r. 15, namely, that "the defendant .... must raise by his pleading all matters which shew the action not to be maintainable or that the transaction is either void or voidable in point of law," nor does it set forth any ground of defence in the true sense of that term. It is merely a statement which, if the evidence proposed to be given is admissible at all, goes in denial or defence of damages, or of a portion of the damages claimed.

Now the plaintiff if he succeeds in shewing that the libel is published concerning him, and concerning his occupation as a jockey, will be entitled to a verdict, unless the defendant absolutely proves his justification. If he proves his justification there is an end of the case, but if he does not prove his justification, then comes the question of damages. It is said that the damages ought to be reduced, or may be reduced, on the authority of *Scott* v. *Sampson* (1), by evidence of general reputation of bad character.

(1) 8 Q. B. D. 491.

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Hawkins, J.

I purposely avoid expressing any opinion which I may entertain (and I do entertain one strongly) upon the subject of *Scott* v. *Sampson* (1), because the matter will be dealt with by the Judge who will have this case before him at Nisi Prius, when he will hear all the arguments that can be urged both for and against the admissibility of the evidence. My whole concern here is to examine whether or not this proposed paragraph ought to be added to the record under the circumstances which are now before us. My opinion is that it ought not, and I think that this 4th rule of Order XXI. is express upon the subject: "No denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted." I suppose that would imply where damages must of necessity form a part of the cause of action, as, for instance, where damages are special. Special damage is particularly a part of the cause of action itself. But then the rule says further, "No denial or defence shall be necessary as to damages claimed," that is to say, the total amount claimed, "or their amount," that is to say, the defence as to any part of the amount of damages claimed.

I think, therefore, my brother Charles was right in refusing to allow this paragraph to be put upon the record, and that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Greenfield & Cracknall.*
Solicitors for defendant: *Lewis & Lewis.*

(1) 8 Q. B. D. 491.

P. B. H.

HENNESSY *v.* WRIGHT.

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May 17;
June 11.

Practice—Production of Documents—Privilege—Affairs of State—Affidavit—Sufficiency—Order XXXI., *rr.* 12, 13, 14.

An action for libel was brought by the governor of a colony, the alleged libel consisting in a statement made by the defendant in a newspaper that the plaintiff, as governor, had sent to the Secretary of State for the Colonies garbled accounts of certain proceedings in the colonial assembly. The defendant pleaded that the statement was true. On an application for discovery by the defendant the plaintiff in his affidavit specified certain documents to the production of which he objected, as follows: "I have in my custody, but acquired and held by me in my capacity of Her Majesty's Governor of M. and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of copies of various dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty to inquire into the affairs of M. and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of those instructions and of the rules and regulations of Her Majesty's Colonial Service I am unable to produce the said documents, and I object to produce them on the ground aforesaid." No affidavit or statement was made on behalf of the Secretary of State in support of the objection.

Held, that it sufficiently appeared that the documents in question were privileged from discovery, and that the application must be refused.

Beatson v. *Skene* (5 H. & N. 838) discussed.

APPLICATION by the defendant for discovery referred to the Court by Denman, J. The nature of the documents and the grounds of the plaintiff's objection to the production of them are stated in the head-note and in the judgments of the Court.

Lumley Smith, Q.C. (*W. Graham* with him), for the defendant. From the description of the documents given by the plaintiff in his affidavit it may be inferred that their contents are relevant to the issues raised. A mere statement by the plaintiff that the Colonial Secretary has directed him not to disclose them "on the ground of the interest of the state and the public service" cannot render the documents privileged from discovery. Where privilege is meant to be claimed on this ground at the trial either the head of the department or his deputy appears to claim it, or the

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Attorney-General is instructed to do so. The same considerations apply to discovery before the trial.

Lockwood, Q.C., and *Cagney*, for the plaintiff. Accepting, as the Court is bound to do, the statements contained in the affidavit as accurate, the documents are not in "the possession or power" of the plaintiff within the meaning of Order XXXI., r. 14. They are state papers, and as such are the property of the Crown or of the Colonial Secretary. This would clearly be so if they were originals, and the rule must be the same as regards copies. In any case the plaintiff has only a joint possession of the documents with the Colonial Secretary, and he cannot therefore be required to produce them: *Kearsley* v. *Phillips*. (1)

The plaintiff has used the only means in his power at this stage of the case of informing the Court that the Colonial Secretary has prohibited the production of the documents. At the trial the Colonial Secretary can be called as a witness. On an application for discovery he cannot be compelled to make an affidavit.

There is a series of decisions which establishes that it is the duty of the Courts to refuse discovery of documents which are ascertained to be state papers and as such privileged from inspection: *The Bellerophon* (2); *Rajah of Coorg* v. *East India Company* (3); *Smith* v. *East India Company* (4); *Home* v. *Bentinck* (5); *M'Elveney* v. *Connellan*. (6)

Lumley Smith, Q.C., in reply. According to *Beatson* v. *Skene* (7) a personal statement made in Court at the trial by the head of the department that the documents cannot be produced without prejudice to the public service is essential. It is implied in *Kain* v. *Farrer* (8) that the same rule applies to interlocutory proceedings. There being no affidavit by the Colonial Secretary the defendant is entitled to an order for inspection.

Cur. adv. vult.

June 11. FIELD, J. This is an application by the defendant for discovery in an action brought by the Governor of Mauritius

(1) 10 Q. B. D. 36, 465.
(2) 44 L. J. (Adm.) 5.
(3) 25 L. J. (Ch.) 345.
(4) 1 Phill. 50.
(5) 2 B. & B. 130.
(6) 17 Ir. C. L. R. 55.
(7) 5 H. & N. 838.
(8) 37 L. T. (N.S.) 469

against the publisher of the *Times* newspaper for libel. It seems that in Mauritius, as elsewhere, there are rival political parties the members of which express their views in the popular assembly, and these views the plaintiff as governor is bound to report to the Colonial Secretary. The alleged libel consists in a statement made in the newspaper that the plaintiff "edited" his reports thus made so as to convey to the Colonial Secretary an erroneous impression of the state of public opinion in the colony. The defendant pleads that this statement is true. The plaintiff does not claim that the reports which are said to have been "edited" are privileged from discovery, but he claims that certain other documents are so. Of these documents his affidavit gives the following description: "I have also in my custody (he perhaps purposely does not say 'possession'), but acquired and held by me in my capacity of Her Majesty's Governor of Mauritius, and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of documents numbered 1 to 8, both inclusive, and tied up in a bundle marked A and initialled by me. Such documents consist of copies of various dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty in the year 1886 to inquire into the affairs of the Mauritius and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of these instructions, and of the rules and regulations of Her Majesty's Colonial Service (1), I am unable to produce the said documents, and I object to produce them on the ground aforesaid." These statements the Court accepts as true.

It was argued for the plaintiff that *Kearsley* v. *Phillips* (2)

(1) A copy of these was produced, but they are not referred to in the judgments of the Court.

(2) 10 Q. B. D. 36, 465.

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applies. There a Divisional Court and the Court of Appeal refused to compel the production of deeds which appeared to be the joint property of the defendant and a person not a party to the action. But here it is not, and I suppose could not be, alleged that these copies are the joint property of the plaintiff and the Colonial Secretary. In *Pope* v. *Curl* (1), in which Lord Hardwicke restrained Curl, the printer, from publishing letters written by the poet Pope, the property in the letters was treated as being in the poet as their writer. History shews that the executors of statesmen have raised questions as to the property in state papers. I believe it was formerly the practice for the head of a department, on his retirement, to take away even originals, but that this has been altered, and that he now has copies prepared, as the plaintiff in this case appears to have done, for his protection. However, as there is no suggestion of a joint property in the copies, *Kearsley* v. *Phillips* (2) plainly does not apply.

A more important question remains. Accepting the other statements in the affidavit as to the circumstances under which the copies were prepared and the action taken by the Colonial Secretary as true, are the copies privileged? There are two aspects of this question. First, the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the Crown were liable to be made public in a court of justice at the instance of any suitor who thought proper to say "fiat justitia ruat cælum," an order for discovery might involve the country in a war. Secondly, the publication of a state document may be injurious to servants of the Crown as individuals. There would be an end of all freedom in their official communications, if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice. Other exceptions allowed by the law to the absolute right of the suitor to discovery, the privilege

(1) 2 Atk. 342. (2) 10 Q. B. D. 36, 465.

of the communications which pass between a solicitor and his client, or that of those made by an informer to a revenue officer, may be explained in a similar manner.

As regards state documents, the law is well stated in *Smith* v. *East India Company* (1) and *Home* v. *Bentinck*. (2) In *Smith* v. *East India Company* (1) it was held in Chancery that the Company was not bound to produce in answer to a bill of discovery a correspondence between the directors of the Company and the Board of Control, the state department to which the directors were responsible. The case turned to some extent on an Act of Parliament, and Lord Lyndhurst said: "It is quite obvious that public policy requires, and, looking to the Act of Parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraints or limitations; but it is also quite obvious that if at the suit of a particular individual these communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within the class of official communications which are privileged, inasmuch as they cannot be subject to be communicated without infringing the policy of the Act of Parliament and without injury to the public interest." The only difference between that case and the present is, that here a servant of the Crown, who is himself a party to the communications, is plaintiff. But a servant of the Crown ought not to be placed at a disadvantage in comparison with other subjects, and the plaintiff will be placed at a serious disadvantage if, because he is a servant of the Crown, he cannot defend his honour without the seal of secrecy being removed from his official communications. In *Home* v. *Bentinck* (2) there is an admirable exposition of the same principle by Dallas, C.J. That was an action for libel, brought by an officer in the army against the president of a commission appointed by the Commander-in-Chief to report as to his conduct in relation to a speculation. The libel was said to

(1) 1 Phill. 50. (2) 2 B. & B. 130.

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be contained in the report. The minutes were brought into court by the military secretary to the Commander-in-Chief, the official having the custody of such documents. Abbott, C.J., refused to allow them to be read. A bill of exceptions to his ruling was tendered, and there was a long argument. The Court held the ruling of Abbott, C.J., right "on the broad principle of state policy and public convenience, and upon the principle of all the cases cited." Now the copies in question are described as copies of communications which have passed between the Colonial Secretary and the governor of a colony, or between one or other of these high officials and a Royal Commissioner appointed to investigate the affairs of the colony. These communications are state documents of the same class as those in the cases cited, and therefore the copies are also state documents and are primâ facie as such privileged from production.

It is, however, argued that the copies are not privileged because there has been no sufficient claim of privilege by the Colonial Secretary. It is said that, as at nisi prius, it would be according to practice that the Colonial Secretary or his authorized representative should appear to state that he objects to the production of the documents, so here on a summons for discovery, a personal affidavit by the Secretary of State or his deputy is essential, and that there being no such affidavit the plaintiff is entitled to inspection. The principal case relied on in support of this contention is *Beatson* v. *Skene*. (1) That was an action for slander brought by a general who had served in the Crimea. There was a question as to the minutes of a military inquiry and other documents at the War Office. The Secretary for War attended at nisi prius and objected to the production of the papers as prejudicial to the public service, and Bramwell, B., declined to compel their production, basing his refusal solely on the ground of the statement made in court by the Secretary for War. This ruling was considered by the Court of Exchequer on an application for a new trial, with the result that Pollock, C.B., and Wilde, B., agreed with Bramwell, B., Martin, B., dissenting. Pollock, C.B., says, in giving the judgment of the Court: "It is manifest that the question must be determined either by the presiding judge or by

(1) 5 H. & N. 838.

the responsible servant of the Crown in whose custody the paper is. It appears to the majority of the Court (i.e., Pollock, C.B., and Bramwell and Wilde, BB.) that the question must be determined not by the judge but by the head of the department having the custody of the paper; and if he is in attendance, and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. My brother Martin is of opinion that, whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel the production, notwithstanding the reluctance of the heads of the department." As regards the question thus raised, I desire to say, while disclaiming all intention of dictating to the judge who may try this case, that I do not feel the difficulty which appears to have weighed with the majority of the Court, and that, should the head of a department take such an objection before me at nisi prius, I should consider myself entitled to examine privately the documents to the production of which he objected, and to endeavour, by this means and that of questions addressed to him, to ascertain whether the fear of injury to the public service was his real motive in objecting. It is clear, however, that this decision has no bearing on the present case. The judgment refers not to a summons for discovery, at which the head of the department does not and need not attend either personally or by deputy, and as regards which neither he nor anyone on his behalf is under any obligation to make an affidavit, but to a proceeding at nisi prius at which the head of the department has both appeared and objected.

I think, however, that there is authority for refusing production of these copies at this stage of the case, apart from any intervention of the Colonial Secretary. In *Anderson* v. *Hamilton* (1) Lord Ellenborough at nisi prius refused to admit in evidence a correspondence between the Colonial Secretary and the governor of a colony, although the Colonial Secretary was present and raised no objection. In *Home* v. *Bentinck* (2) Dallas, C.J., treats this as the right course for the presiding judge to adopt under such circumstances. In neither of the cases in

(1) 2 B. & B. 156, n.

(2) 2 B. & B. 130.

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which the East India Company was concerned, neither in *Smith* v. *East India Company* (1), nor in *Rajah of Coorg* v. *East India Company* (2), where the production of similar documents was refused, in the one case by Lord Lyndhurst, in the other case by Knight Bruce, L.J., was there any affidavit on behalf of the Board of Control. In *The Bellerophon* (3), where the point arose with reference to a report made to the Lords of the Admiralty by a captain in the navy, an affidavit was made on behalf of the Lords of the Admiralty, but I do not gather that the existence of this affidavit was the ground of the refusal of the Court to order the production of the report. In *McElveney* v. *Connellan* (4), where the question was as to the liability to production of a report made by the Inspector-General of Prisons in Ireland to the Lord Lieutenant, the point was raised both on a summons for discovery and at the trial, and the judges of the Irish Court held that on both occasions production was properly refused on the ground of the public interest. At the trial the Attorney-General for Ireland appeared and objected on behalf of the Lord Lieutenant, but on the summons discovery was refused though there was not any affidavit by or on behalf of the Lord Lieutenant before the Court. For these reasons I am of opinion that discovery of these documents ought not to be granted at this stage of the case. I say nothing as to what course should be taken at the trial. The order must, therefore, be refused.

WILLS, J. The plaintiff in this case sues the defendant for libel, the substance of the libel being that the plaintiff, as Governor of the Mauritius, "edited" reports of speeches by various members of the council of Mauritius, which he sent home to the Secretary of State as the speeches spoken by the persons to whom they were attributed. The defendant justifies. The plaintiff was called upon for an affidavit of documents. He sets out and offers to produce for inspection copies of what I may call the incriminated dispatches and speeches, but besides them he admits the possession of (inter alia) a bundle of papers numbered 1 to 8, and sufficiently identified, which he says are "copies of

(1) 1 Phill. 50.
(2) 25 L. J. (Ch.) 345.
(3) 44 L. J. (Adm.) 5.
(4) 17 Ir. C. L. R. 55.

various dispatches, reports, and other communications which passed either between the Colonial Secretary and himself in his capacity as Governor of the Mauritius, or between the Royal Commissioner appointed by Her Majesty in 1886 to inquire into the affairs of the Mauritius and himself as governor of the colony, or between the said Commissioner and the Colonial Secretary." He adds, "that the attention of the Colonial Secretary has been directed to the nature and dates of the documents, and that the Colonial Secretary has directed him not to produce or disclose them, and to object to their production on the ground of the interest of the state and of the public service."

The plaintiff objects on these grounds to their production, and the question is whether, under these circumstances, an order ought to be made for their inspection.

Had the Secretary of State himself made affidavit that, in his opinion, the production of the documents would be injurious to the public service, the question would, I think, in the absence of special circumstances, have been completely governed by authority: see *Beatson* v. *Skene* (1); *The Bellerophon* (2); *Smith* v. *East India Co.* (3); *Rajah of Coorg* v. *East India Co.* (4) The case was before us a short time ago upon an application for a further affidavit of documents, and we then pointed out that the objection had in many reported cases been taken in this fashion, and in this way the plaintiff's attention was pointedly called to the fact that such materials would leave the Court in no doubt as to the proper action to take. The plaintiff, however, is not furnished with any such materials. Whether he is unable or unwilling to avail himself of the suggestion I do not know. It is argued on his behalf that he has complied with what is necessary in this respect by the portion of his affidavit which says that he is directed by the Secretary of State not to produce the documents. I am of opinion, however, that if the case be one in which the Court ought to require the assurance of the Secretary of State that production would be prejudicial to the public interests, the plaintiff's affidavit falls far short of what is necessary. The statement that the attention of the Secretary of State has

(1) 5 H. & N. 838.
(2) 44 L. J. (Adm.) 5.
(3) 1 Phill. 50.
(4) 8 De G. M. & G. 182.

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been directed to the nature and dates of the documents is far too vague. If this kind of assurance be necessary at all, I think it ought to appear that the Secretary of State has seen and considered the documents, and has formed a real judgment as to the propriety of their being produced, something going much beyond the fact that his attention has been called, presumably by the plaintiff himself, "to their nature and dates." In such a case there should, in my opinion, be a statement on oath, either by the Secretary of State himself, or by some person duly commissioned by him to make on his behalf such a statement, that the matter has been considered by the Secretary of State, and that he assures the Court in one of these ways that the production would in his opinion be prejudicial to the public service. A statement in court on his behalf by the Attorney-General has sometimes been accepted as equivalent to the oath of the Secretary of State, a point upon which I express no opinion. But, in my judgment, if the Secretary of State's assurance be necessary in order to protect the documents from inspection, a mere statement, such as is contained in the plaintiff's affidavit, is quite insufficient—a proposition for which, I think, that *Kain* v. *Farrer* (1) is an authority—and I think that under such circumstances the assurance should be given in some fashion less open to exception than by the affidavit of one of the parties to the action in which discovery is sought. I do not mean to lay down as a matter of law that such a method of proving the objection of the head of the department can in no case and under no circumstances be accepted. Artificial rules upon matters of evidence are better avoided as far as is possible. I only wish to say that to me, in the present case, which presents no exceptional circumstances to justify it, this method of establishing the fact relied upon is not such as I should be prepared to act upon.

The question therefore arises whether, in the absence of objection by the responsible minister of the Crown, it is the duty of the judge on an application for discovery to prevent the disclosure of the contents of such documents as those now in question, viz. dispatches on matters connected with the public service passing between the governor of a colony and the Secre-

(1) 37 L. T. (N.S.) 469.

tary of State. A document of this character is undoubtedly in the nature of a state paper. Primâ facie, and if it is what it professes to be, it is called into existence simply for the service of the state, and it may be expected to relate not to mere matters of business and routine, but to matters of government and policy, and to be in its nature private and confidential. There are, undoubtedly, many matters in respect of which it is the duty of the judge, quite apart from objection taken, to prevent disclosures of a class which it would be undesirable in the public interests to permit. If a police officer, for example, were asked in court from what source he got his information in respect of an offence, it would, I apprehend, as a general rule, be the duty of the judge to direct him not to answer the question, since the mere possibility of having such information disclosed would operate as a powerful check upon persons disposed to give information in respect of such matters.

In my opinion the present case is covered by authority. In *Anderson* v. *Hamilton* (1), in an action against the Governor of Heligoland for false imprisonment, a correspondence between Lord Liverpool and the defendant was produced by the Under Secretary of State. He made no objection on behalf of the Government to the production of the letters; but, notwithstanding that fact, and whilst calling attention to it, Lord Ellenborough declined to allow "secrets of state to be taken out of the hands of Her Majesty's confidential servants." This was in the year 1816. In *Home* v. *Bentinck* (2) an action was brought against an officer who had been directed by the Commander-in-Chief to hold an inquiry touching the conduct of the plaintiff, an officer in the army, for alleged libels contained in the report of that inquiry. The case was tried in 1819 before Abbott, C.J. The report was produced by Sir H. Torrens, the military secretary to the Commander-in-Chief, and no objection was raised by him or on behalf of the Commander-in-Chief to its production, but, upon objection by the defendant's counsel, the Chief Justice rejected it on the ground now under discussion. A bill of exceptions was tendered and the case was argued before the Court of Exchequer Chamber. The question was not whether the defendant was entitled to

(1) 2 B. & B. 156, n. (2) 2 B. & B. 130.

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protection from the consequences of publishing a libel on the ground that it was a privileged communication, but whether the judge was right in excluding it altogether at the trial. "The question," said Dallas, C.J., in delivering the judgment of the Court, "is whether if Sir Henry Torrens under a mistake had been disposed," to produce the report, "it would not have been the bounden duty of the learned judge before whom the case was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence," and the ruling of the learned Lord Chief Justice was upheld "on the broad ground of state policy and public convenience." In *McElveney* v. *Connellan* (1) the Irish Court declined on the same grounds, and on an application for discovery, to order production of a report of the Inspector General of Prisons to the Lord Lieutenant, although there was no evidence before it of objection on the part of the Lord Lieutenant. This decision was referred to with approval by Sir Joseph Napier in *Stace* v. *Griffith* (2), decided in 1869, and in that case, both in the course of the argument and in delivering the judgment of the Privy Council, Lord Chelmsford refers to *Anderson* v. *Hamilton* (3) as laying down the correct rule as to the admissibility of public documents, and that official letters are not receivable in evidence. "It was absolutely necessary," said Lord Chelmsford, "before any evidence of the contents of this letter was admitted, that the judge should determine that it was not an official communication." In 1873, in *Dawkins* v. *Lord Rokeby* (4), an action for libel was brought against the defendant for statements made to the Commander-in-Chief in the report of a court of inquiry upon the conduct of an officer, the contents of the documents in question were stated to the jury, whereupon Blackburn, J., directed a verdict for the defendant on the ground that such proceedings were absolutely privileged, even if the statements they contained were wilfully false and malicious. A bill of exceptions was tendered, and the case was heard by the Court of Exchequer Chamber in 1873. It was held

(1) 17 Ir. C. L. 55 (186).
(2) Law Rep. 2 P. C. 420, 425.
(3) 2 B. & B. 156, n.
(4) Law Rep. 8 Q. B. 255.

by that Court, on the authority of *Home* v. *Bentinck* (1), that the proceedings in question were inadmissible in evidence. "We cannot doubt," said the learned Lord Chief Baron, "that if the attention of the judge who tried this cause had been called to this decision, although the parties had admitted the evidence, he would have felt it, in the language of Dallas, C.J., "his bounden duty to have interposed and prevented the admission of such evidence."

I think the above cases abundantly shew that no sound distinction can be drawn between the duty of the judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought.

With one exception, the cases cited arose with reference to evidence sought to be introduced upon the trial. It is obvious that whatever difference may exist between the case of evidence asked for or tendered at the trial and that of an application for discovery or inspection, is altogether in favour of a refusal to order discovery in the earlier stages of the case. I should be reluctant to say anything which could interfere with the discretion of the judge at nisi prius, or to treat it as impossible for circumstances to arise which might justify a judge at the trial in deciding that a particular document of the class under consideration ought to be produced. At the trial, in most cases, the document is only to be got at by subpœnaing the head of the department of state concerned with it. It has happened, and may happen again, that, instead of stating that in his opinion it ought in the interest of the public service to be withheld, he submits that very question to the Court. The responsible officer of state being subpœnaed has, at all events, the opportunity of considering the question and taking the objection, and the judge at the trial has a much better opportunity of judging whether production ought to be ordered or allowed than the Court can have upon an application at the present stage of the action, when, unless production be refused, mischief might be done behind the back and without the knowledge of the officer of state, who, to put it at the lowest, would certainly have a right

(1) 2 B. & B. 130, at p. 162.

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to state his objections to production, a right which, in all but exceptional cases, would be pretty certain to secure the protection claimed. The question whether or not in the public interest production of the document should not be allowed is so far a matter of state rather than of legal decision, that it is within the undoubted competence of the responsible minister of the Crown by taking the proper steps to interfere and raise an objection to which every tribunal would be certain, to say the least, to pay respectful attention; and we must be careful in dealing with an interlocutory application like the present to see that a right which has been established for great purposes of public welfare, and which, with one exception presently to be noticed, has been unformly respected at nisi prius for a great number of years, is not frustrated by an order for discovery.

The only cases which can be cited as establishing anything like a conflict of authority upon this important question are *Dickson* v. *Lord Wilton* (1) and *Kain* v. *Farrer*. (2)

In *Dickson* v. *Lord Wilton* (1) Lord Campbell compelled a clerk in the War Office, who attended upon a subpœna addressed to the Commander-in-Chief, to produce letters written by the commanding officer of a regiment to his superior officer touching matters connected with the discipline of the regiment, in spite of his statement that he was directed by the head of the department to refuse to produce them. In *Beatson* v. *Skene* (3) the Court of Exchequer, after holding that the proceedings of a military court of inquiry to the production of which objection was taken by the Secretary for War, could not in the circumstances of that case be produced, went on to refer to *Dickson* v. *Lord Wilton* (1) and to observe that if the documents were produced without objection, or with a mere submission to the judge as to whether they should be produced or not, "the case might be different." In *Dawkins* v. *Lord Rokeby* (4) it was said by the Court of Exchequer Chamber that *Dickson* v. *Lord Wilton* (5) was in conflict with a mass of authorities, and must be considered as overruled. In *Kain* v. *Farrer* (2) an action against the Secretary of the Board of Trade for acts done by the Board of Trade, privilege was

(1) 1 F. & F. 419.
(2) 37 L. T. (N.S.) 469.
(3) 5 H. & N. 838, 854.
(4) Law Rep. 8 Q. B. 255, at p. 273.
(5) 1 F. & F. 419.

claimed for certain documents on the ground that the defendant objected on the ground of public policy to produce them. It was held that the affidavit was insufficient, and production was ordered. If that case is in conflict with the numerous authorities above cited, and it seems to me difficult entirely to reconcile it with them, it is clear that they must prevail, and that *Kain* v. *Farrer* (1) cannot be supported.

It was argued on behalf of the plaintiff that the application was in any case premature, and that at this stage an order for discovery could not be made, although the documents might be liable to be disclosed at the trial; and it has undoubtedly happened that in many reported cases the objection has been taken at the trial, and not at an application for discovery, which, as regards the Courts of Common Law, is a modern proceeding. In my opinion, however, there are reasons, which I have already pointed out, for refusing discovery which may possibly not apply at the trial; and whilst I should be sorry to limit unnecessarily the right to see documents at the only stage of the case at which, very often, they are of any practical value, on the other hand it must not be forgotten that to order production may render of no avail the right of the Crown, which exists in the public interest, to object in the proper manner to publicity being given to the documents.

The plaintiff sought to exclude the documents in question on the ground that they do not belong to him, but to the Secretary of State. If this be anything but another way of putting the proposition already dealt with, I do not accede to it. The copies to which the matter now in hand relates are, as far as I can see, subject to the duty upon him not to disclose them, the plaintiff's own, and *Kearsley* v. *Phillips* (2) and similar decisions, to which a large part of the arguments for the plaintiff was addressed, appear to me to have nothing to do with this case, which is not one of joint ownership or custody at all, nor depending upon any considerations applicable to such cases. In my opinion the order asked for must be refused.

Order refused.

Solicitors for the plaintiff: *C. & S. Harrison & Co.*

Solicitors for the defendant: *Soames, Edwards, & Jones.*

(1) 37 L. T. (N.S.) 469.

(2) 10 Q. B. D. 36, 465.

H. D. W.

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July 27.

[IN THE COURT OF APPEAL.]

CHARMAN *v.* SOUTH-EASTERN RAILWAY COMPANY.

Railway Company—Level Crossing—Obligation to maintain Gates—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20) *s.* 47.

By s. 47 of the Railway Clauses Consolidation Act 1845, "If a railway cross any public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith . . . and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway."

In an action against a railway company for not properly fencing their line at a level crossing according to s. 47, whereby horses belonging to the plaintiff strayed on to the line and were killed, it appeared that there were gates at the level crossing of the full width of the road properly so called, but that a swing gate had been placed by the defendants upon a piece of land beyond the limit of the road, on the same line with the gates, for the convenience of foot passengers using the crossing. The plaintiff's horses after straying from his land arrived at the gates at the level crossing, and finding them closed, turned aside to the swing gate, and, forcing their way through it, owing to the defective condition of the posts, got on to the line and were killed by a passing train:—

Held, that there was evidence of a breach of the defendants' obligation under s. 47 to fence in the railway from the road, and that they were liable.

Appeal by the defendants against an order of a Divisional Court (Manisty and Stephen, JJ.) for a new trial.

The action was brought against the defendants for not fencing their line in accordance with their statutory obligation under 8 & 9 Vict. c. 20, s. 47, whereby two horses of the plaintiff strayed on the defendants' line and were killed by a passing train. At the trial before Huddleston, B., it appeared that the plaintiff was occupier of a farm at Albury, Surrey, and that four horses belonging to him strayed one night from the farm into an adjoining road, and found their way on to an open common, and thence into a road leading from the common across the railway, which it crossed on a level. At the crossing the railway was protected from the road by two large gates which were opened when necessary to allow any vehicle or animals proceeding along the road to cross

the railway. On the left hand side of these gates, upon a triangular piece of ground belonging to the defendants, and beyond the limit of the road, was a smaller swing gate for the use of foot passengers which was not kept locked, and by means of which passengers could cross the railway at any time. The plaintiff's horses, as was supposed, on arriving at the crossing and finding the larger gates closed, turned towards the small swing gate and pushed against the fence between the posts. One of the posts, of which the part sunk in the earth had become rotten, gave way, and the fence between the posts fell down, and thus the four horses got on to the railway, and two of them were killed by a passing train.

The learned judge held that there was no evidence of negligence to go to the jury and directed that judgment should be entered for the defendants upon a motion for a new trial. The Divisional Court held that it was a question of fact for the jury whether the fence which the horses broke down was a part of the gate which, by s. 47 of the Railways Clauses Act, 1845, the railway company were bound to maintain at the level crossing, and that there must be a new trial.

The defendants appealed.

W. Willis, Q.C., and *Leslie Probyn*, for the defendants. The sections which impose on a railway company the liability to maintain fences and gates are ss. 47 and 68 (1) of the Railways

(1) Sect. 47 enacts that, "If the railway cross any turnpike road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates: and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway."

Sect. 68 enacts that a railway company shall make and maintain, "for the accommodation of the owners and occupiers of lands adjoining the railway . . . . sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway."

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Clauses Act, 1845. These sections have now superseded ss. 9 and 10 of 5 & 6 Vict. c. 55: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis.* (1) The plaintiff's horses were straying upon the road, and, as against straying cattle, there is no obligation on a railway company to fence their line: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis* (1); *Ricketts* v. *East and West India Docks, &c., Ry. Co.* (2); *Midland Ry. Co.* v. *Daykin.* (3) Moreover, the obligation imposed on the defendants by s. 47 only compels them to maintain gates of the exact width of the road which the railway crosses. Here the swing gate and the fence round it, which was broken down by the plaintiff's horses, were situate outside the limit of the road, and therefore the defendants were under no obligation to maintain it. They might have removed the swing gate and the fence around it altogether. In *Fawcett* v. *York and North Midland Ry. Co.* (4) it was held that an obligation was imposed on a railway company to keep the gates at a level crossing closed, as well against stray cattle on the road as against cattle travelling thereon. But there the gates which had been left open were on the highway, and the case does not apply to a fence which is off the highway and situate on the defendants' land.

Winch, Q.C., and *Tufton*, for the plaintiff. The intention of the Act is, that such gates shall be maintained by a railway company as will prevent any animals which are going along the road from getting upon the railway. Sect. 47 means that the gates shall "fence in the railway," both when they are "closed" across the road and when they are "closed" across the railway.

In *Dawson* v. *Midland Ry. Co.* (5) it was held that the obligation imposed by s. 68 extended to a person whose horse was allowed by the occupier of land adjoining a railway to graze on that land; that the owner of the horse was in fact an "occupier" of the land within the meaning of s. 68, and could recover from the company the value of the horse, which got on to the railway by reason of a defective fence and was killed by a train.

W. Willis, Q.C., in reply. Sect. 47 says nothing about "closing"

(1) 14 C. B. 213.
(2) 12 C. B. 160.
(3) 17 C. B. 126.
(4) 16 Q. B. 610.
(5) Law Rep. 8 Ex. 8.

the gates across the railway when animals are crossing it; it only means that the gates are to be closed across the road.

LORD ESHER, M.R. This is not an easy case to decide, but we must endeavour to construe s. 47 in a reasonable manner, having regard to the purposes for which it was framed. I will assume that the gates at this level crossing are the exact width of the road. A small swing gate has been placed by the defendants beyond the limit of the road, in the same line with the wide gates, for the use of persons crossing the line on foot. I will assume that this gate and the fence surrounding it, as they were originally constructed, would have kept horses and cattle off the railway, and that the fence had, without any negligence of the company, but by reason of their not having observed the rotten condition of one of the posts, become insufficient for that purpose. If that be so, and if the defendants were bound to guard that particular spot, it was the same thing as if there had been no guard there at all. The question, therefore, must come to this, whether, as against the plaintiff, the defendants were bound to guard that particular spot, so as to prevent straying cattle or horses getting from the road on to the railway. Now the plaintiff's horses were straying horses, and, therefore, if his case were rested upon s. 68 of the Act, the authorities shew that he was not using the road by his horses in such a way as to enable him to recover damages from the company under that section. The decision in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis* (1) was, I think, a strong decision, but it was the decision of a very strong Court. It amounted to this, that if a man is driving his cattle along a road which runs alongside a railway, or even allowing them to be upon it, he is entitled to protection under s. 68 as an "occupier" of land adjoining the railway, but that if his cattle are straying on the road or are driven there by some one else without his consent, although his cattle are doing the very same thing, and are running precisely the same danger as if they were there with his consent, he is not an "occupier" of the road, and s. 68 does not apply to him. It is useless now to cavil at that decision, and I think that no Court of Appeal ought to

(1) 14 C. B. 213.

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interfere with it and the cases which have followed it, for the business of the railway companies of this country has been for many years carried on subject to them, and the railway companies, though they have had many opportunities, have not attempted to obtain an alteration of the law as so declared. I think, therefore, that those decisions must stand. I will only venture to say, that, if they did not stand, I should be inclined to go further in favour of the railway company than they did. It is plain that the plaintiff cannot avail himself of s. 68.

The question, therefore, is reduced to this—whether, according to the true construction of s. 47, the plaintiff can avail himself of the protection given by it. The railway company have brought their line at a level across this road, which was existing before the railway, and s. 47 is intended to give protection to some extent to the persons who are using a road which is interfered with in this way by a railway. Therefore, I think that, so far as is possible, s. 47 ought to be construed so as to give the necessary protection to the persons whose former free passage along the road is interfered with by the railway—in such a way as to give those persons, so far as the words will permit, an effectual remedy. It has been argued that the words of the section oblige us to say that, if the company's gates which are put across the road are of the same width as the road, that is all which the company are called upon to do, and that, if cattle make use of the road in the way in which cattle will almost inevitably use it, and there is a defect in the protection of the railway beyond the width of the road, the company will not be liable for any injury which may result to the cattle from their getting upon the railway. It is obvious that in such a case as the present, if a place beyond the width of the road in a line with the wide gates is left unprotected, the almost inevitable consequence will be that cattle going along the road in the ordinary way in which cattle are almost certain to do will get upon the railway beyond the gates. If so, it seems to me that the remedy supplied by the gates would not be effectual to prevent the mischief, which is caused by the fact that the railway is brought across the road on a level. We must, therefore, examine s. 47 closely to see whether the words oblige us to say that this ineffective remedy is all the

remedy which the legislature has given to the persons who use the road. Now s. 47 says that the company shall erect and maintain sufficient gates "across such road." The gates will be "across" the road, even if they are wider than the road. They cannot be narrower than the road, but they may be wider. Then s. 47 says that the gates are to be "of such dimensions, and so constructed, as when closed to fence in the railway"—not to fence in the road or the level crossing, but to fence in the railway—"and prevent" (that is, constructed so as to prevent) "cattle or horses passing along the road from entering upon the railway." If the words "along the road" are construed with the utmost strictness, they must, no doubt, be limited to cattle and horses keeping on the actual line of the road. But, giving to the words a construction which I think they will fairly bear, they may be read so as to make the remedy effective, that is, as meaning, "so as to prevent cattle using the road as a road of passage from entering upon the railway." And one consideration seems to me to shew conclusively that the gates must in some cases be wider than the road. Suppose that, as happens in many cases, the line of railway is wider than the road; if the gates in such a case were only the exact width of the road, though they would bar the road when they were shut across it, they would not, when they were closed across the railway to allow cattle to pass over it, prevent the cattle from entering upon it. There would be an opening in the middle through which the cattle could pass on to the line. In such a case the gates must clearly be wider than the road Supposing, then, that the circumstances are such that, if the gates when they are shut across the road are only of the exact width of the road, there will be left a gap so near to the gates that horses and cattle using the road, and acting in the way in which horses and cattle would almost inevitably act, or, at all events, in which it is extremely probable that they would act, would step off the road, and, seeing the gap at the end of the gate, would naturally go through it on to the railway. If s. 47 only requires that the gates should be of the exact width of the road, the consequence in such a case would be that, though the railway had come across the road at a level, the remedy of the gates given by s. 47 would not be a real remedy for the mischief so far as horses

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and cattle are concerned; it would be just as inefficient as if there were no gate at all across the road. Is that the true meaning of s. 47? In my opinion it is not. I think that the company are bound to make the gates, not merely the width of the road, but of such a width that when they are closed they will fence in the railway so as to prevent cattle or horses, which are using the road as a road of passage, and acting as cattle or horses naturally would act upon such a road, from entering "on the railway"—not merely from entering on the level crossing—but from entering on the railway, and, whatever the width of the road, if it is necessary to do so in order to give that protection, the gates must be made wider than the road. To say, however, that the company would be obliged to make a fence a quarter of a mile long, or even a hundred yards long—something which no one could call a gate—would be absurd and unreasonable. The obligation is to make something which can reasonably be called a gate, of such a width as to prevent cattle or horses which are going along the road from getting on to the railway, if they are only acting as cattle or horses according to their nature will almost inevitably act.

Under the circumstances of the present case it seems to me that the large gates were not wide enough, but that the company were bound also to maintain the swing gate at the side and the fence surrounding it, in a proper condition. The evidence shews that this fence was not in its then condition sufficient to prevent the plaintiff's horses, which were using the road, from going on to the railway. In my opinion, the company were bound to make and maintain all the gates which they had actually erected in a sufficient state of repair. Judgment must therefore be entered for the plaintiff for the amount which we are told has been agreed upon between the parties.

LINDLEY, L.J. I also am of opinion that this case ought to be decided adversely to the railway company.

We ought to be careful, on the one hand, not to stretch the obligations of railway companies in favour of other persons, and, on the other hand, to see that the obligations which are imposed on the companies by the legislature are adequately performed.

It is impossible in dealing with a question of this kind to avoid looking both at s. 47, which relates to level crossings, and at s. 68, which relates to the fences of land adjoining the railway. The object of the two sections together is, that the railway may be properly fenced off both from public highways which it crosses and from adjoining land. That is the object of the two sections, and they ought to be construed so as to give effect to that object—so as to protect the public who use the highways and level crossings and to protect the owners of adjoining land. If Mr. Willis's construction is right, there will be a very serious omission in the protection given to the public from the danger of level crossings.

In my judgment the present case turns very much (indeed I might say entirely) upon that which the railway company themselves have done. They have in fact widened this road at the level crossing—whether they have thrown the triangular piece of land by the swing gate into the road so as to dedicate it to the public I need not pause to inquire. Physically they have widened the road upon which cattle passing along can get, and they have made that little triangular piece of land a part of the level crossing. They have done this partly for their own convenience, and partly for the convenience of the public. It is obviously extremely convenient for foot passengers not to be kept waiting until the large gates are open, and, on the other hand, it is extremely convenient to the railway company not to be compelled to have a porter always there to open the large gates. It is a mutual convenience. But I wish to point out that this s. 47 would not apply to a case in which the road had not been widened by the railway company for purposes of their own. In the present case the company have widened the road, and have put three gates across it instead of two. One of those gates was defective, not defective for foot passengers, but the post of the fences against which it rested had got into such a rotten condition that the plaintiff's horses pressing against it broke it down and so got on to the railway. It appears to me, looking at the duty which s. 47 imposes upon the company of fencing off their line at level crossings, that they have failed to perform their obligation.

The key to s. 47 appears to me to be found in a consideration

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of its general scope, and not in a very critical examination of its language. The object of the section is, that the railway shall be effectually fenced off from roads which it crosses on a level, and the company are bound to maintain "sufficient gates" across the road—it does not say one, or two, or how many—and the pith of it is, that the gates "shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway." I say nothing about the case of an open field on one side of the road adjoining the railway, and some portion of the fence of the field being broken. We have to deal with a case in which the road has been widened by the company, so that cattle or horses passing along the old road can get on to the triangular piece of ground which has been added to it, and it appears to me that the railway company have failed to keep in sufficient repair the gates which they have placed across the road thus widened. That is the substance of the case. Any other construction of the Act would lead to this result, that, in consequence of some little overlapping of the two sections, the company would not do the very thing which they were intended to do, viz. prevent horses and cattle from getting on to the railway. Having widened the road for their own purposes and for the convenience of the public, the company must put up sufficient gates to satisfy s. 47. I do not think this is a case under s. 68, but I think it falls under s. 47.

Appeal dismissed.

Solicitor for company: *W. R. Stevens.*

Solicitors for plaintiff: *Bennett, Dawson, & Bennett.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Aug. 9.

IN THE MATTER OF A PROHIBITION IN THE MAYOR'S COURT OF LONDON.

BROAD *v.* PERKINS AND ANOTHER.

Prohibition—Application after Judgment—Discretion to refuse Writ of Prohibition.

The granting of a writ of prohibition to an inferior Court that has exceeded its jurisdiction is discretionary.

Prohibition to the Mayor's Court, London, in a case in which that Court had exceeded its jurisdiction, refused on an application made after judgment, but before execution.

THIS was a motion for a writ of prohibition directed to the Mayor's Court of London to restrain that Court from proceeding in the action.

The action was one of libel, and resulted in a verdict for the plaintiff for 40*s.* and costs. The costs were taxed, but before execution an application was made to Field, J., at chambers, for a writ of prohibition, on the ground that there had been no publication of the alleged libel which would give jurisdiction to the Mayor's Court. The learned judge granted the writ, but his decision was reversed on appeal by a Divisional Court (Mathew and A. L. Smith, JJ.), who held that the granting of the writ was a matter of discretion, and that under the circumstances of the case it should be refused. On appeal from this decision the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) decided that there had been an excess of jurisdiction, but they directed that the question whether under such circumstances the Court had any jurisdiction to refuse a writ of prohibition should be argued before the full Court.

1888. July 3. *A. Cock, Q.C.*, and *Trevor White*, for the defendants, argued that the writ was of right, and that the Court was bound to restrain an inferior Court from going beyond its jurisdiction.

[They cited *Serjeant Morton's Case* (1); *Admiral* v. *Linsted* (2);

(1) 1 Sid. 65.

(2) 1 Sid. 178.

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Woodward v. *Bonithan* (1); *Ford* v. *Welden* (2); *Parish of Aston* v. *Castle Birmidge Chapel* (3); *Bishop of St. David's* v. *Lucy* (4); *Bodenham* v. *Ricketts* (5); *Mayor of London* v. *Cox* (6), and cases cited therein in the opinion of Willes, J.; *Quartly* v. *Timmins* (7); *Worthington* v. *Jeffries* (8); *Chambers* v. *Green* (9); *Ellis* v. *Flemming* (10); *Bridge* v. *Branch.* (11)]

W. Willis, Q.C. (*Fillan*, and *Keeling*, with him), contended that the granting of a writ was discretionary, and that it ought to be refused where the party applying had acquiesced in the jurisdiction of the Court below. [He cited *Case of the Admiralty* (12), *Vanacre* v. *Spleen* (13), *Argyle* v. *Hunt* (14), *Yates* v. *Palmer* (15), and *Serjeant* v. *Dale* (16), and cases cited therein.]

A. Cock, Q.C., in reply.

Cur. adv. vult.

1888. Aug. 9. The judgment of the full Court (Lord Esher, M.R., Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ.) was read by

LORD ESHER, M.R. The Court having considered this case, has come to the conclusion that it is within the proposition laid down in the opinion of Willes, J., in *Mayor of London* v. *Cox* (17), and that the proposition is to be accepted as law. It seems to us that the House of Lords adopted that opinion as a whole:—"Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant, which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance; yet considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case,

(1) Sir T. Raym. 3.
(2) Sir T. Raym. 91.
(3) Hob. 66.
(4) 1 Ld. Raym. 539.
(5) 6 N. & M. 170.
(6) Law Rep. 2 H. L. 239.
(7) Law Rep. 9 C. P. 416.
(8) Law Rep. 10 C. P. 379.
(9) Law Rep. 20 Eq. 552.
(10) 1 C. P. D. 237.
(11) 1 C. P. D. 633.
(12) 12 Co. Rep. 78.
(13) Carth. 33.
(14) 1 Str. 187.
(15) 6 D. & L. 283.
(16) 2 Q. B. D. 558.
(17) Law Rep. 2 H. L. 239, at p. 283.

and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant." This rule, however, does not affect the right of the Crown to claim a writ of prohibition at any stage.

Appeal dismissed.

Solicitor for plaintiff: *T. Connolly.*

Solicitors for defendants: *Cave, Cox, Cave & Lafone.*

A. M.

[IN THE COURT OF APPEAL.]

Aug. 9.

THE LONDON AND COUNTY BANKING COMPANY, LIMITED, AND OTHERS *v.* THE LONDON AND RIVER PLATE BANK, LIMITED.

Trover—Negotiable Securities—Holder for Value.

Certain negotiable securities were stolen from the defendants by their manager, and came into the possession of the plaintiffs for value, and without notice of any fraud. Subsequently the manager obtained the securities from the plaintiffs by fraud, and restored them to the defendants, who did not know that the securities had been out of their possession. A portion of the restored securities were not the bonds actually stolen, but bonds of a like kind and value:—

Held, that, in the absence of evidence to the contrary, it should be presumed that the defendants accepted the securities in discharge of their manager's obligation to restore them, and were therefore bonâ fide holders for value, and entitled to retain them.

THIS action was brought by the plaintiffs to recover from the defendants £9000 Unified Egyptian Bonds, £2000 Egyptian Preference Government Bonds, 300 shares in the Pennsylvania Railway Company, and £2400 New South Wales Bonds. It came on for trial before Manisty, J., and a special jury, but was referred to a special referee to report, and was reserved for further consideration on his report, with power to draw inferences of fact.

From the report of the referee the following facts are taken:—

The plaintiffs were the London and County Banking Company, Limited, Robert Henry Capps, and John Record; but for the purposes of this report the case may be treated as if Capps were the sole plaintiff.

A person of the name of Warden was secretary and manager

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of the defendant company, and had access to the securities deposited by customers with them. He had, in 1882, incurred a loss in Stock Exchange speculations conducted for him by John Davis Watters, a stockbroker not a member of the Stock Exchange. The dealings of Watters were necessarily conducted by him through members of the Stock Exchange, of whom Capps was one. Record was Capps' manager. To cover the loss above mentioned, Warden handed to Watters securities belonging to the defendant company. In January, 1883, Watters consulted Warden about a loss of his own, and eventually Warden handed him securities belonging to the bank to cover that loss. From that time forward Warden and Watters were continually engaged in large speculative transactions on the Stock Exchange. Before each fortnightly settling-day Watters used to tell Warden what amount of securities he would require, and whatever he wanted Warden abstracted from the bank and gave to him.

The securities thus abstracted were from time to time wanted by Warden at the bank for various purposes—for example, to cut off coupons. They were in particular wanted by Warden at the beginning of October, 1883, to exhibit them at an audit of stocks and shares on which the bank had advanced money to their customers. October 1, 1883, was fixed as the audit-day, and a list was prepared for audit by the transfer clerk. Warden gave Watters a list of the securities which had been abstracted and would be required for the audit, and Watters undertook to redeem them. Among these were securities which had been deposited by Watters with Capps in the course of the business transactions between them, and Watters accordingly applied to Capps for them, and handed him a cheque for 13,000*l.* on his own bankers. Capps thereupon obtained the securities to recover which this action was brought from different banks with which he had deposited them, and handed them to Watters, who passed them on to Warden, by whom they were placed among the securities at the defendant bank, and exhibited to the auditors. Watters, however, failed to redeem all the securities abstracted by Warden, and this led to the discovery of the fraud of Warden, and ultimately both he and Watters were tried and convicted in respect of their dealings with property of the defendants other than the

securities in question. Capps and Record received the securities without any knowledge of the fraud of either Warden or Watters, and were holders of them for value. Watters, when he gave the cheque for 13,000*l.* to Capps, had only a small balance at his bank, and he intended to meet the cheque by obtaining from Warden either the same securities or other securities which he expected Warden would be able to abstract from the defendant bank, and hand over to him. The cheque was dishonoured but Watters before the discovery of his being implicated in the fraud had paid Capps two sums, amounting to about 1700*l.*, on account of his indebtedness.

On further consideration, before Manisty, J., questions arose as to the negotiability of the Pennsylvania Railway shares, as to the exact identity of certain of the restored bonds with those stolen from the bank, and as to the right of Capps to disaffirm the transfer of the securities to Watters on the ground that it was procured by fraud, but it is not necessary for the purposes of this report to go into these questions. The learned judge gave judgment for the defendants on the ground that they were holders of the securities for valuable consideration. (1)

The plaintiffs appealed.

1888. July 10. *Sir Horace Davey, Q.C.*, and *Finlay, Q.C.* (*C. K. Francis*, with them), for the appellants. When the negotiable securities, except the Pennsylvania Railway shares, as to which there is no appeal, had been passed to Capps for value, the defendants ceased to have any property in them. Their right to them never revived, for they never knew that the securities had been stolen from them, and consequently never knew that they had any right of action against Warden. They cannot, therefore, have taken the bonds in accord and satisfaction of that right of action, for this would require a consensus of mind—the intention on one side to give the consideration, and on the other to release the right of action. The defendants cannot rely on their former title to the securities, but must shew a new one to displace that of Capps, and this they cannot do, because they do not shew that they gave value, and Capps having parted with

(1) 20 Q. B. D. 232.

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the securities on a fraudulent representation, can disaffirm the transaction, and is entitled to recover them.

[They cited *Kingsford* v. *Merry* (1) and *Stevenson* v. *Newnham*. (2)]

Sir Richard Webster, A.G., and *R. T. Reid, Q.C.* (*F. M. Abrahams*, with them), for the respondents. The question whether the defendants are bonâ fide holders for value is not one of accord and satisfaction, nor of knowledge, but whether they got back the securities under such circumstances that they could have held them against Warden and Watters. The defendants have not got to consider the title of Warden when the securities were returned, but only to shew that they gave value. Whether the returned bonds were the ones that were originally taken away, or only their equivalents, the defendants, when they were replaced, lost their right of action, for they could not recover things which were in their own possession. The fact that there had been a criminal offence would have been no bar to such an action, though possibly it might have delayed it: *Wells* v. *Abrahams*. (3) [They then argued that Capps had not parted with the securities on any misrepresentation or fraud, and that under the circumstances he could not disaffirm the transaction and claim that the property in the securities was still in him.]

Sir Horace Davey, Q.C., in reply.

Cur. adv. vult.

1888. Aug. 9. LORD ESHER, M.R. This case was tried before Manisty, J., who decided in favour of the defendants. The real plaintiff in the action is a person of the name of Capps, and the action arose in this way:—There were two persons of the names of Warden and Watters, who seem to have been confederates in crime. Warden was manager of the defendants' bank, and he stole from them securities which we must assume, as it has not been argued before us, were negotiable. These were handed to Capps for consideration, and without any knowledge by him of any fraud. When the audit of the bank came Warden would have had to produce all the securities in his custody, and among

(1) 1 H. & N. 503. (2) 13 C. B. 285.
(3) Law Rep. 7 Q. B. 554.

others those that had been stolen. On an application to Capps, he accepted a cheque from Watters, and delivered back the securities, which were produced at the audit, as if they had always been in the custody of the bank. A part only of the amount represented by the cheque was paid, and Capps maintains that under these circumstances the securities belong to him.

I think it clear, on the first point raised before us, that these negotiable instruments having been given to Capps originally for a good consideration, and he having no knowledge of the fraud, the property passed to him, so that the defendants must do more than rely on the mere fact of their having got the bonds back into their possession, and must shew something more than that to enable them to hold them as against Capps.

Then it is said that the securities were obtained from Capps by a false pretence, or, at all events, a fraud, which would entitle him to disaffirm the agreement under which he handed them back. Now, without solving the questions whether he could do so, and whether in such case he would not have had to disaffirm the agreement altogether, and whether, as he retained the £1700 he received in part payment, he has disaffirmed, or can do so, let us go on to the next question. These are negotiable instruments, and assuming they were the property of Capps, and had been obtained from him by false pretences or fraud, and assuming that he could disaffirm, are not the defendants persons who have given value for these negotiable instruments, and without any knowledge of a fraud on Capps? The defendants, when Warden stole these securities, could not only have indicted him for the theft, but they could have brought an action against him for the wrongful conversion of the securities. When he restored them, they lost their right, for how could they bring an action for the conversion of instruments which were in their own possession? I am of opinion that the destruction of this right of action is a value moving from them, and that it is immaterial that they did not know what they were doing. There is therefore a sufficient valuable consideration to make the case come within the ordinary rule applicable to holders of negotiable instruments obtained for a valuable consideration, and without knowledge of any fraud, and therefore their right to hold these securities is complete. I

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think, therefore, the judgment for the defendants was right, and that the appeal must be dismissed.

LINDLEY, L.J. My brother Bowen desires me to say that he has read and agrees with the following judgment.

In this case the plaintiffs unquestionably acquired the property in these bonds, and if the plaintiffs had continued to hold them the defendants could not have recovered them even if the defendants had prosecuted Warden, and he had been convicted of stealing the bonds from the defendants. See 24 & 25 Vict. c. 96, s. 100, by which stolen negotiable securities in the hands of a bonâ fide holder for value are made an exception to the general rule which applies to the restoration of stolen property on the conviction of the thief.

But the plaintiffs lost possession of the bonds; the plaintiffs were induced to part with them by a fraud; and the bonds were restored to the possession of the defendants by the thief who had stolen them from the defendants in the first instance. The plaintiffs having thus lost possession of the bonds seek to recover them from the defendants; and the question is whether the plaintiffs are entitled so to do.

It is remarkable that this question should be so free from all direct authority as it in fact is. The question has not apparently ever called for decision before. It is absolutely new and must be decided on principle.

The plaintiffs contend that although the defendants are bonâ fide holders of the bonds, yet the defendants are not holders of them for value; that the defendants have not acquired them for value since the plaintiffs were induced by fraud to part with them; and that consequently the property in the bonds which had certainly become vested in the plaintiffs has never been divested from them.

In order to deal with this argument it is necessary to consider the legal effect of the restoration of the bonds to the defendants by Warden, who had previously stolen them from the defendants.

The legal consequences of the theft were: 1, to render Warden liable to conviction for a criminal offence: 2, to render him liable in a civil action to restore the bonds or pay their value to the

defendants. In addition to his criminal responsibility he was under a civil obligation to the defendants to restore the bonds or their value to them. The existence of this civil obligation affords in my opinion the clue to the solution of the problem which has to be solved.

When Warden restored the bonds which he had stolen, he was doing no more than he was bound to the defendants to do; he was discharging, or, at all events, partly discharging, his obligation to them, and if the defendants chose to accept the bonds in such discharge his obligation to the defendants would have been extinguished, if not wholly, at least to the extent of the value of the bonds restored. In the case supposed, the defendants clearly would have been bonâ fide holders of the bonds for value; the value being the extinction of Warden's obligation to themselves; and in the case supposed, the defendants would have acquired a good title as against the plaintiffs.

But then it is said that the defendants did not in fact accept the bonds when they were restored in discharge of Warden's obligations, inasmuch as the defendants did not know that the bonds ever had been stolen from them, and did not know that Warden was under any obligation in respect of them, and did not know of their restoration by him.

All this is perfectly true, but is not in my opinion decisive against the defendants. Their acceptance of the bonds in discharge of Warden's obligation, which existed in truth although the defendants did not know it, may, and in my opinion ought to be presumed in the absence of evidence to the contrary.

This presumption is, I think, warranted by authority, for although the exact point has not been decided, an analogous point has. It was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift (*Butler and Baker's Case* (1)), and this doctrine has been applied even as against the Crown, and so as to defeat a title accruing to it before actual assent: *Smith* v. *Wheeler* (2), referred to at length in *Small* v. *Marwood* (3), and in *Siggers* v. *Evans* (4). In the

(1) 3 Rep. 25 a.
(2) 1 Vent. 128.
(3) 9 B. & C. 300, at p. 306.
(4) 5 El. & Bl. 367, at p. 382.

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last-mentioned case the presumption was held to apply to a gift of an onerous nature; and in *Standing* v. *Bowring* (1) the presumption was also held to apply to a gift which the donor desired to revoke before the donee knew that it had been made. The presumption of acceptance in such cases is artificial, but is founded on human nature; a man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of assenting were given him. Taking these decisions and this reasoning as guides, I am of opinion that in the absence of evidence to the contrary the defendants ought in point of law to be presumed to have accepted from Warden the bonds which he handed over to them in discharge of his obligation to them, which obligation existed to his knowledge although not to theirs. It would be contrary to human nature to suppose that the defendants would not have kept the bonds if they had known of their theft from themselves, and of their restoration; and we know as a fact that the defendants have insisted on their right to retain the bonds ever since they discovered the theft.

If the above reasoning be correct it follows that as soon as the bonds were restored the presumption of acceptance arose, subject to be rebutted by evidence of non-acceptance; and there being no evidence of non-acceptance, but on the contrary proof of acceptance at a later date, the presumption ought to prevail. Acceptance of the bonds at the date of their restoration being thus arrived at, satisfaction to some extent, if not in full, of the thief's civil obligation follows, and the defendant's position as bonâ fide holders for value becomes unassailable.

It is obvious that this reasoning applies not only to the bonds originally stolen and afterwards restored, but also to the 2000*l.* preference bonds, which though never stolen from the defendants were given to them in substitution for bonds which were. It is not the restoration of the stolen bonds which is the important point: it is the handing over to the defendants of negotiable instruments in performance of a civil obligation which is the turning point of the case. Such a handing over is not a gift; the person to whom they are handed over is not a donee. A person from whom property is stolen has a right to demand

(1) 31 Ch. D. 282.

restitution from the thief, whether the person robbed knows of the theft or not; and this right and the satisfaction of it by restitution places him in the position of a holder for value, and not in the position of a gratuitous donee. Whether he can retain what he has got as against other persons than the thief depends primarily on the nature of the property handed to him. If such property is a negotiable instrument he can, unless at the time of the handing over he has notice that it belongs to some third party. If the property handed over is not a negotiable instrument other considerations arise; but the present appeal relates only to negotiable securities, and does not involve the necessity of dealing with other kinds of property. I consequently forbear from pursuing this matter further.

My judgment is based upon the ground that on October 1 the defendants became holders for value of the bonds in question within the meaning of the doctrine laid down in *Miller* v. *Race* (1), and became such holders bonâ fide, and without notice of the plaintiff's title or of any fraud upon them.

This being so, it becomes unnecessary to examine, and I express no opinion upon, the other points alluded to by Manisty, J., and discussed by counsel before us.

Appeal dismissed.

Solicitors for plaintiffs: *Harries, Wilkinson & Raikes.*
Solicitors for defendants: *Michael Abrahams, Son & Co*

(1) 1 Sm. L. C. 9th ed. 491.

A. M.

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Jan. 30, 31;
Feb. 4;
Aug. 11.

THE MOGUL STEAMSHIP COMPANY, LIMITED *v.* McGREGOR, GOW, & CO., AND OTHERS.

Conspiracy—Combination to keep up Rate of Freight—Engrossing particular Trade—Exclusion of Rival Traders from Combination.

The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion, sustained damage:—

Held, that the association, being formed by the defendants with the view of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for a conspiracy was maintainable.

ACTION tried before Lord Coleridge, C.J., without a jury, in which the plaintiffs claimed damages for a conspiracy to prevent them from carrying on their trade between London and China, and an injunction against the continuance of the alleged wrongful acts.

The facts, which are fully set out in the report of an application by the plaintiffs for an interim injunction (1), are shortly as follows:

The plaintiffs were a shipping company incorporated for the purpose of acquiring shares in certain steamships—the *Sikh*, *Afghan*, *Pathan*, and *Ghazee*—and became the owners of a large number of shares in these ships, which were built for and employed in the China and Australian trades. The defendants were an associated body of shipowners trading (among other places) between China and London, who formed themselves into a conference or association for the purpose of keeping up the rate of freights in the tea trade between China and Europe, and securing that trade to themselves by allowing a rebate of 5 per cent. on all freights paid by shippers who shipped tea for Europe in conference vessels only. The defendants alleged (and, as is

(1) 15 Q. B. D. 476.

found in the judgment, truly alleged) that the large profits derived from the tea freights alone enabled them to keep up a regular line of communication all the year round between England and China, and that without a practical monopoly of the tea trade they must cease to do so. The plaintiffs were admitted to the benefits of this conference for the season of 1884, when the following circular was widely distributed by the defendants among the merchants engaged in the China trade:—

"Shanghai, 10th May, 1884.

"To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. & O. Steam Navigation Co.'s, Messagerie Maritime Co.'s, Ocean Steamship Co.'s, Glen, Castle, Shire, and Ben Lines, and to the steamships *Oopack* and *Ningchow*, we shall be happy to allow a rebate of 5 per cent. on the freight charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by any other than the said lines.

"Shipments by the steamships *Afghan*, *Pathan*, and *Ghazee* on their present voyages from Hankow will not prejudice claims for returns.

"Each line to be responsible for its own returns only, which will be payable half-yearly, commencing 30th October next.

"Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

"The foregoing agreement on our part to be in force from present date till the 30th April, 1886."

In May, 1885, the defendants issued and widely distributed among the merchants in the China trade the following circular, which had the effect of excluding the plaintiffs from the benefits of the conference:—

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"Shanghai, 11 May, 1885.

"Referring to our circular dated 10th May, 1884, we beg to remind you that shipments for London by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the conference lines."

The plaintiffs by their statement of claim alleged a conspiracy on the part of the defendants to prevent the plaintiffs from obtaining cargoes for their steamers, such conspiracy consisting in a combination and agreement amongst the defendants, having by reason of such combination and agreement control of the homeward shipping trade, pursuant to which combination and agreement shippers were bribed, coerced, and induced to agree to forbear, and to forbear, from shipping cargoes by the plaintiffs' steamers. In the alternative, the conspiracy was alleged to consist of a combination and agreement amongst the defendants, pursuant to which the defendants, with intent to injure the plaintiffs and prevent them obtaining cargoes for their steamers, agreed to refuse, and refused, to accept cargoes from shippers except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers, and by threats of stopping the shipment of homeward cargoes altogether, which they had the power and intended to carry into effect, prevented shippers from shipping cargoes by plaintiffs' steamers. It is unnecessary for the purposes of this report to set out the defence except to say that the defendants denied the alleged conspiracy and combination, and further contended that the statement of claim disclosed no cause of action.

Sir Henry James, Q.C., Crump, Q.C., Barnes, Q.C., and *Sims Williams*, for the plaintiffs.

Sir Charles Russell, Q.C., Sir Horace Davey, Q.C., Finlay, Q.C., and *Pollard*, for the defendants.

The arguments are fully dealt with in the judgment.

Cur. adv. vult.

1888. Aug. 11. The following written judgment was read by

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LORD COLERIDGE, C.J. This case has stood over from causes not under my control for much longer than I could have desired, but at last I am able to give my opinion in it.

The plaintiffs are a company of shipowners trading, or desirous of trading, between Australia and this country, taking China by the way; and desirous in particular of sharing in the transport of what has been called the "tea harvest," the time of which is in the late spring and early summer months, and the places for loading which, as far as this case is concerned, are Shanghai at the mouth of the Yangtze-kiang and Hankow, a place about 600 miles up the stream of that great river. The defendants are a number of great shipowners, companies, and private partnerships, trading for the most part from this country to China and from China to this country direct, and who, being desirous to keep this very valuable trade in their own hands, and to prevent, if they can, the lowering of freights, (the ruinous lowering as they contend,) which must follow, as they say, from absolutely unrestricted competition, entered into what they call a conference for the purpose of working the homeward trade, by offering a rebate of 5 per cent. upon all freights paid by the shippers to the conference vessels, such rebate not to be paid to any shipper who shipped any tea at Shanghai or Hankow (the rebate was not confined to these ports, but I think that an immaterial circumstance) in any vessels but those belonging to the conference. The agreement between the members of the conference was entered into in April, 1884; and during that year the now plaintiffs were admitted to share in its benefits. They were excluded in 1885. They refused to acquiesce in the exclusion, and a commercial conflict was the result, in which, as I understand, both sides suffered heavily, and it is for the loss which the plaintiffs say they suffered by the proceedings of the conference, who they allege "bribed, coerced, and induced" shippers to forbear from shipping cargoes in the plaintiffs' vessels, that this action is brought. The question is, will the action lie? If I hold that it will, the damages are to be inquired into and settled elsewhere.

It may perhaps be material, at all events I desire, to shew that

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I have not forgotten that there is from the defendants' point of view some moral and sensible defence for their conduct, whatever legal view may at last be taken of it. They run, or at the time of the conference they did run, steamers regularly all the year round from England to China and back again, conferring, as they say, thereby a considerable benefit on the mercantile community of both countries. Further they allege, and I think upon the evidence before me truly allege, that they could not do this at a profit, and that they would therefore probably cease to do it at all, unless they can practically monopolise the carrying trade of the tea at Shanghai and Hankow during the China tea harvest. It is the large profit they make by keeping up the rate of tea freights, so to call them, which enables them to give a regular line of communication during the other months of the year. They contend, therefore, that what they did by the rules of the conference was not purely selfish, though of course self-interest guided them, but that there were real and large public benefits accruing to the inhabitants of China and England from the course which they pursued. I think there is ground for this contention, and it should be kept in mind.

The complaint, then, is this, that the defendants unlawfully combined or conspired to prevent the plaintiffs from carrying on their trade, that they did prevent them by the use of unlawful means in furtherance of such unlawful combination or conspiracy, and that from such unlawful combination or conspiracy therefore damage has resulted to the plaintiffs.

The defendants answer that neither was their combination unlawful in itself, nor were any unlawful means used in furtherance of it; but that the damage, if any, to the plaintiffs was the necessary and inevitable result of the defendants carrying on their lawful trade in a lawful manner.

These are the contentions on the two sides. Is there anything in the law applicable to this subject in which they are agreed? In the statement of the law, as might be expected from the counsel who argued the case, there was often a close apparent agreement; but when it came to the application of it, the same words were evidently not always used on both sides in the same sense. I have carefully read over again and considered the

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arguments, and it seems to me it will be better that I should endeavour to state what I conceive to be the law upon the matter in dispute, and then apply it to the facts before me, which, as most of them depended upon written documents, can hardly be said to have been much disputed.

It cannot be, nor indeed was it, denied that in order to found this action there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike whether the combination is the subject of an indictment or the subject of an action. But in an indictment it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous, and which gives the public an interest to interfere by indictment. Nothing need be actually done in furtherance of it. In the *Bridgewater Case* (1), referred to at the bar, and in which I was counsel, nothing was done in fact; yet a gentleman was convicted because he had entered into an unlawful combination from which almost on the spot he withdrew, and withdrew altogether. No one was harmed, but the public offence was complete. This is in accordance with the express words of Bayley, J., in *Rex* v. *de Berenger*. (2) It is otherwise in a civil action: it is the damage which results from the unlawful combination itself with which the civil action is concerned. It is not every combination which is unlawful, and if the combination is lawful, that is to say, is for a lawful end pursued by lawful means, or being unlawful there is no damage from it to the plaintiff, the action will not lie. In these last sentences damage means legal injury; mere loss or disadvantage will not sustain the action.

Once more, to state the proposition somewhat differently with a view to some of the arguments addressed to me, the law may be put thus. If the combination is unlawful, then the parties to it commit a misdemeanour, and are offenders against the State; and if, as the result of such unlawful combination and misdemeanour, a private person receives a private injury, that gives such person a right of private action.

It is, therefore, no doubt necessary to consider the object of the combination as well as the means employed to effect the

(1) Unreported.

(2) 3 M. & S. 67, at p. 76.

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object, in order to determine the legality or illegality of the combination. And in this case it is clear that if the object were unlawful, or if the object were lawful but the means employed to effect it were unlawful, and if there were a combination either to effect the unlawful object or to use the unlawful means, then the combination was unlawful, then those who formed it were misdemeanants, and a person injured by their misdemeanour has an action in respect of his injury.

If this statement of the law, clear as I hope, be also accurate, as I believe, there is no need to enter into the historical inquiry as to how the action on the case in the nature of a conspiracy grew out of the old, and for many years disused, writ of conspiracy, which was very limited in its operation, and the judgment in which was followed by very terrible consequences. Those who desire to follow out an interesting but otiose inquiry, may find all the materials for it in Fitzherbert de Naturâ Brevium, at p. 260 of the edition of 1730, enriched with Lord Hale's notes, and in the judgment of Lord Holt in *Saville* v. *Roberts*, reported in various books, but best and most fully in 1 Lord Raymond, p. 374, and very well in Carthew, p. 416, where especially the distinction between the ordinary judgment in an action on the case and a villanous judgment, as explained in Jacob's and Tomlins' Dictionaries, is pointed out and insisted on. The whole law on this subject may be found in a most convenient form in the notes to *Hutchins* v. *Hutchins* (1), a case decided in the Supreme Court of the State of New York in 1845, and published by Mr. Melville Bigelow in his very valuable collection of Leading Cases on the Law of Torts, at p. 207 (I cite from the Boston edition of 1875). The first paragraph of the judgment of Nelson, C.J., in that case contains an admirable statement of the law; and Buller's Nisi Prius, pp. 13a and 14, and Selwyn's Nisi Prius, p. 1062, may be usefully referred to, and the note to *Skinner* v. *Gunton* (2), and Termes de la Ley, tit. Conspiracy.

It will appear from the statement which I have given of what I believe to be the law, that I cannot assent without some qualification to the propositions which were pressed upon me by the

(1) 7 Hill (New York) 104.

(2) 1 Wms. Saund. ed. 1845, p. 229.

learned counsel for the contending parties in this case. For the same reason I do not propose to enter into a detailed examination of the many cases which were cited in argument. I believe that, fairly considered and rightly looked at, every case, including the much canvassed one of *Rex* v. *Turner* (1), will be found to be consistent with the principles I have stated, although there are isolated dicta of very great judges, probably in their actual terms —if the terms are rightly reported—going beyond the law, certainly quite at variance with each other. On one side are extreme cases such as *Keble* v. *Hickringill* (2), in which at first Lord Holt doubted but finally gave judgment for the plaintiff, and *Reg.* v. *Druitt* (3), in which, unless he is misreported, Bramwell, B., said he thought a combination to treat a man with "black looks" was an indictable misdemeanour (a decision, if it be one, which might assuredly land us in unexpected and singular results); and the very broad dictum of Pratt, C.J., in *Rex* v. *Journeyman Tailors of Cambridge* (4), that "a conspiracy of any kind is illegal, though the matter they conspired about might have been quite lawful for them to do." These are perhaps as extreme as can be found on one side; on the other is the questioned and possibly overruled case of *Rex* v. *Turner* (1), decided by Lord Ellenborough, C.J., and Grose, Le Blanc and Bayley, JJ. The view which Lord Ellenborough took of the facts of that case appears rather from his interlocutory observation at p. 230 than from his judgment on the page following. It is difficult not to acquiesce in the good sense of Lord Ellenborough's observations, and speaking, as I wish, and, indeed, ought, to speak, with grateful respect of Lord Campbell, I do not feel so sure that Lord Ellenborough was wrong simply because Lord Campbell in *Reg.* v. *Rowlands* (5) says he has no doubt he was so. Be that as it may, and if Lord Ellenborough and the Court did wrongly apply the principles of law in *Rex* v. *Turner* (1), the principles are clearly and forcibly stated in accordance with what I have endeavoured to express by Lord Ellenborough himself. The case of *Rex* v. *Eccles* (6), before Lord Mansfield, C.J., Willes and

(1) 13 East, 228.
(2) 11 Mod. 74, 131.
(3) 10 Cox, C. C. 592.
(4) 8 Mod. 11.
(5) 17 Q. B. 671, at p. 686.
(6) 1 Leach, C. C. 274.

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Buller, JJ., turned upon pleading; the motion was in arrest of judgment; the decision was that after verdict the indictment was good; and the case itself is expressly commented on, explained and distinguished by Lord Ellenborough in *Rex* v. *Turner*. (1)

There were a number of cases, of which *Winsmore* v. *Greenbank* (2), *Lumley* v. *Gye* (3), and *Bowen* v. *Hall* (4), were examples, in which the question of conspiracy did not arise; but they were cited to shew what cases of interference with what sort of contracts had been held actionable by the Courts at the suit of one individual against another. Now all these cases bind me sitting here, and I neither question nor desire to evade their authority. But they do not help me much. I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who suffered injury from them. The question comes at last to this, what was the character of these acts, and what was the motive of the defendants in doing them? The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavour by lawful means to keep their trade in their own hands and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavour to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, of bribing, I see no evidence; of inducing,

(1) 13 East, 228.
(2) Willes, 577.
(3) 2 E. & B. 216.
(4) 6 Q. B. D. 333.

in the sense in which that word is used in the class of cases to which *Lumley* v. *Gye* (1) belongs, I see none either.

One word in passing only on the contention that this combination of the defendants was unlawful because it was in restraint of trade. It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent. off their bills at Christmas on condition of their customers dealing with them and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question.

But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage has resulted to the plaintiffs an action will lie. I concede that if the premises are established the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this. Was then this combination such? The answer to this question has given me much trouble, and I confess to the weakness of having long doubted and hesitated before I could make up my mind. There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters shewed the importance they attached to the matter, their resolute purpose to exclude the plaintiffs if they could, and to do so without any consideration for the results to the plaintiffs, if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering, (I give examples only,) men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his

(1) 2 E. & B. 216.

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cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is in words difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference; in 1885 they excluded them, and they were determined no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or illwill to the plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it they thought, and honestly and, as it turns out, correctly thought, that for a time at least there would be an end of their gains.

The plaintiffs' conduct cannot affect their right of action, if they have it; but it is impossible not to observe that they were as reckless of consequences in regard to the defendants as they accuse the defendants of being in regard to themselves; they were as determined to break in as the defendants were determined to shut out; and they made their threats of smashing freights and injuring the defendants a mode of rather forcible suasion to the defendants to let them into the conference. If they have their right of action, why they have it; if they have it not, their own conduct disentitles them to much sympathy.

On the whole I come to the conclusion that the combination was not wrongful and malicious, and that the defendants were not guilty of a misdemeanour. I think that the acts done in pursuance of the combination were not unlawful, not wrongful, not malicious; and that therefore the defendants are entitled to my judgment.

Judgment for the defendants.

Solicitors for plaintiffs: *Gellatley & Warton.*

Solicitors for defendants: *Freshfields & Williams.*

W. J. B.

[IN THE COURT OF APPEAL.]

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June 29.

THE QUEEN *v.* THE REGISTRAR OF DEEDS FOR THE COUNTY OF MIDDLESEX.

Middlesex—Registration of Deeds—Middlesex Registration Act (7 *Anne, c.* 20), *ss.* 1, 5, 17—*Deed of Enfranchisement—Witness to Memorial—Oath taken before London Commissioner to administer Oaths in Chancery.*

A deed of enfranchisement of copyholds in Middlesex is not within the exception of copyhold estates in the Middlesex Registration Act (7 Anne, c. 20), s. 17, and must be registered.

So held by the Court of Appeal, affirming the decision of Lord Coleridge, C.J., and Mathew, J.

By s. 5 of the Act the memorial of deeds required to be registered (under s. 1) shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, attested by two witnesses, one whereof is to be one of the witnesses to the execution of such deed, which witness shall upon his oath before one of the registrars or before a master in Chancery ordinary or extraordinary, prove the signing and sealing of the memorial and the execution of the deed mentioned in such memorial.

On application to register a memorial of a deed of enfranchisement it appeared that one of the witnesses to such memorial was a witness to the execution of the deed by the grantee, but that neither of them was a witness to the execution by the grantor :—

Held by the Court of Appeal, affirming the decision of Stephen and Wills, JJ., that such witness was one of the witnesses to the execution of the deed within the meaning of s. 5, and that the memorial was duly attested.

It further appeared that the oath of the attesting witness was taken before a London commissioner to administer oaths in Chancery, appointed under 16 & 17 Vict. c. 78 :—

Held, affirming the decision of Stephen and Wills, JJ., that the oath had been duly administered.

RULE calling on Lord Truro, registrar of deeds for the county of Middlesex, to shew cause why a mandamus should not issue commanding him to register the memorial of a deed in the Middlesex registry.

It appeared that the prosecutor attended at the registry office to register a memorial of an indenture dated July 8, 1885, being an enfranchisement of a copyhold by the Duke of Northumberland and his son to the two copyholders, of whom the prosecutor was one.

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The execution of the memorial, which was under the hand and seal of the prosecutor, was attested by William Derham and Thomas Richards. Derham was the witness attesting the execution of the deed by the grantees, but neither Derham or Richards attested its execution by either of the grantors.

Indorsed on the memorial was the following certificate :—

"I hereby certify that the within-named William Derham made oath of the signing and sealing of this memorial, and of the execution of the deed to which it refers, at 51, Bread Street, in the city of London, before me,

Thomas H. Weeks,

a commissioner to administer oaths in the Supreme Court of Judicature in England, and a London commissioner to administer oaths in Chancery appointed under s. 2 of 16 & 17 Vict. c. 78, residing at 51, Bread Street, in the city of London, this 2nd day of May, 1887."

The registrar refused to register the memorial on the ground that a London commissioner to administer oaths in Chancery had no authority to administer the oath under 16 & 17 Vict. c. 78. Mr. Munton accordingly applied for a mandamus to direct Lord Truro, the registrar, to register the memorial.

The application was opposed on the above ground, and also on the ground that neither of the witnesses attesting the memorial was a witness to the execution of the deed of July 8, 1885, by either of the grantors.

On July 20, 1887, Stephen and Wills, JJ., overruled both objections after full argument, and made the rule for a mandamus absolute.

The registrar made a return by which he stated the above objections, and also alleged that the land mentioned in the memorial was at the time of the execution of the indenture of July 8, 1885 of copyhold tenure, and that before the memorial was brought for registration that indenture had been recorded on the court rolls of the manor.

On April 14, 1888, Lord Coleridge, C.J., and Mathew, J., held this objection also to be untenable.

The registrar appealed.

Channell, Q.C., and *Trevelyan*, (*Sir R. E. Webster, A.G.*, with them), for the registrar. First, the deed does not require registration, as it comes within the proviso of s. 17 of the Middlesex Registry Act excepting copyhold estates from the operation of the Act (1). The deed took effect upon copyhold property; when it was executed the copyhold estate was gone, and the deed was therefore in substance a conveyance of a copyhold. The mischief intended to be guarded against by the Act could not arise in the present case, for a second enfranchisement could not be made, and the deed is entered on the court rolls.

It will be urged that the lord could convey the freehold to another person, but if that person could acquire priority by registration, the anomalous tenure mentioned in *Murrel* v. *Smith* (2), would be produced, which the legislature cannot have intended to promote.

Secondly, a witness who only attests the execution by the grantee of the deed of conveyance does not fulfil the condition of being a witness to the execution of the deed which is imposed by the Middlesex Registry Act, s. 5. Lord St. Leonards in his work on Vendors and Purchasers gave it as his opinion that such a witness was not within the meaning of the condition: Sugden's Vendors and Purchasers, 11th ed. 970. The observation in the text was omitted in the later editions: 12th ed. (Concise View) 579; 13th ed. 600; 14th ed. 730, and the judges in the Court

(1) By 7 Anne, c. 20, s. 1, a memorial of all deeds and conveyances of or concerning and whereby any honors, manors, lands, tenements or hereditaments in the county of Middlesex may be in any way affected in law or equity, may be registered in such manner as therein directed.

By s. 5 every memorial to be entered and registered shall be put into writing on vellum or parchment, and brought to the Registry office, and "shall be under the hand and seal of some or one of the grantors or some or one of the grantees, his or their heirs, executors or administrators, guardians, or trustees, attested by two witnesses one whereof to be one of the witnesses to the execution of such deed or conveyance, which witness shall upon his oath before one of the said registrars or masters, or before a Master in Chancery ordinary or extraordinary, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial."

By s. 17 "this Act shall not extend to any copyhold estates or to any leases at a rack rent, or to any lease not exceeding one and twenty years, where the actual possession and occupation goeth along with the lease. . . ."

(2) 4 Co. Rep. 24 b.

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below thought that the learned author had changed his mind, but that does not appear, for his Lordship still refers to the same cases, and the omission, which first occurred in the Concise View, was merely by way of abridgment. *Jack* v. *Armstrong* (1), decided in 1828 on a clause in the Irish Act identical in its terms with s. 5 of the Middlesex Act, is in point, and was followed in *Re Stephens.* (2) The case of *Reg.* v. *Registrar of Deeds in Middlesex* (3) is to the same effect so far as it goes, but it does not go the full length, for the deed was a peculiar deed. In Jarm. & Byth. Conv. ix., 683, the opinion of Lord St. Leonards was questioned, but this does not countervail his authority.

[FRY, L.J. Suppose there were ten grantors, and the execution by each was attested by a separate witness, will the oath of one of these witnesses be insufficient?]

The view of Lord St. Leonards was that execution by a person whose execution was unnecessary was not execution within the meaning of the Act. It is not contended that a person who witnessed the execution by one only of several necessary parties would be insufficient. In *Sadlier* v. *Biggs* (4) Lord St. Leonards uses language which indicates that he had not changed his opinion.

Thirdly, the oath was not taken before a person who had jurisdiction to administer it. The question is of pecuniary importance to the registry, as it has been decided that the registrar is entitled to a fee for taking the oath. The Act provides that the oath must be taken either before the registrar or before one of the masters, ordinary or extraordinary, in Chancery. The masters extraordinary only exercised their functions beyond a certain distance from London; they could not take an oath within that limit. Gen. Ord. in Chancery, June 18, 1623; May 22, 1661; Dec. 21, 1833, Ord. 33. By 15 & 16 Vict. c. 80, the office of master in ordinary was abolished, and the only clause as to transfer of their jurisdiction is s. 36, which has no bearing on the present case. Then as to the masters extraordinary, the Act 16 & 17 Vict. c. 78, s. 1 (5), does not abolish the office, but gives them a

(1) 1 Huds. & Br. 727.
(2) Ir. Law Rep. 10 Eq. 282.
(3) 1 El. & El. 322.
(4) 4 H. L. C. at p. 460.
(5) 16 & 17 Vict. c. 78, s. 1: "The persons now styled 'masters extraordinary in Chancery' shall cease to be so styled, and they and all persons

new title. They could not exercise their functions within ten miles of Lincoln's Inn Hall. The contention of the registrar is that the Middlesex Registry Act imposed this duty on the masters extraordinary as personæ designatæ, because they were acquainted with the administration of oaths, but did not make it a part of the duties of their office. Then s. 2 creates the London commissioners. It does not give them the power of administering an oath under the Registry Act, because that was not a power appertaining to the office of master extraordinary. It is urged on the opposite side that the wording of s. 5 covers a reference to the Registry Act, but the answer is that it only applies where statutes have annexed certain powers to their office. But if the power of administering an oath under the Registry Act was given to them, the Judicature Act of 1873 has taken it away. Sects. 77, 82, 84, define the duties of the commissioners, and do not include this.

Reid, Q.C., and *W. Murray*, for the respondent.

[COTTON, L.J. We wish to hear you only on the question

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hereafter appointed by the Lord Chancellor to execute like duties in England shall be designated 'commissioners to administer oaths in Chancery in England,' and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of master extraordinary in Chancery by virtue of any statute or order of the Court of Chancery or of the Lord Chancellor, or usage in that behalf, or otherwise."

Sect. 2: "It shall be lawful for the Lord Chancellor from time to time to appoint any persons practising as solicitors within ten miles from Lincoln's Inn Hall, at their respective places of business, to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, and to possess all such other powers and discharge all such other duties as aforesaid; and such persons shall be styled 'London commissioners to administer oaths in Chancery;' and they shall be entitled to charge and take a fee of one shilling and sixpence for every oath administered by them, and for every declaration, affirmation, or attestation of honour taken by them, subject to any order of the Lord Chancellor varying or annulling the same."

Sect. 5: "Nothing herein contained shall abridge or lessen the power of the Lord Chancellor as it now exists to appoint fit persons to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, or to regulate the fees to be taken by them; and where any Act of Parliament refers to the masters extraordinary in Chancery, or to their powers or duties, the reference shall be held to apply to and include the commissioners hereinbefore mentioned, or to their powers or duties, as the case may be."

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whether the witness ought not to be one of the witnesses to the execution of the conveyance by the grantor.]

The observations of Lord St. Leonards were not judicial, and, eminent as his authority is, the Court will not feel bound by it. His Lordship founds his remarks on the Irish cases, but they were decided under the Irish Act, which was expressly passed, inter alia, for the purpose of preventing forgeries. But no such object is expressed in the English Act. By s. 5, the memorial is to be under the hand and seal of some or one of the grantors or some or one of the grantees. There is, therefore, no reason why the words "execution of such deed or conveyance" should have their natural meaning restricted by inserting "by the grantors." The natural meaning of the expression is, "one whereof to be one of the attesting witnesses to the deed." The object of the requisition was, no doubt, to shew that the deed was not a sham, that there really was such a deed, and that is as well secured by one attesting witness as another.

Channell, Q.C., in reply. The word "execution" should be construed to refer only to execution by some party whose execution makes the deed effectual as a conveyance, and not to execution by an unnecessary party. If a deed was executed by the grantee only, nobody could say that it was executed for the present purpose.

COTTON, L.J. Several points have been argued before us in this case, and the first with which I shall deal is the contention that the statute 7 Anne, c. 20, does not apply at all to such a deed as this. The proviso in the 17th section is this: "Provided always, and be it further enacted, that this Act shall not extend to any copyhold estates or to any leases at a rack rent . . . ." Now it is argued that as this deed was a deed of enfranchisement it relates as well to the copyhold as to the freehold, and that therefore the Act does not apply to it. But, in my opinion, that is altogether wrong. The meaning of the proviso is that the Act shall not extend to conveyances of copyhold estates. Why? Because conveyances of copyhold estates appear on the court roll, and therefore there is no probability of notice not being given to a subsequent purchaser of what has been done as

regards them. But what is this deed? It is not a deed relating to copyhold estates at all. It is a deed acting only as a conveyance of the freehold, and though by means of that conveyance of the freehold to the copyhold tenant his copyhold tenancy is extinguished and the copyhold tenement ceases to exist, the deed is not in any way a conveyance, nor does it purport to be a conveyance, of the copyhold estate. It was urged: "If that is so what would be the effect of a subsequent conveyance of the same property being executed by the lord of the manor?" It would convey to the grantee that freehold which had been conveyed to the copyhold tenant. What position the former copyhold tenant would be in is a question with which I do not deal, but that there might be a conveyance by a subsequent deed of the same things as are conveyed by this deed is evident, for what is the present deed? It is a conveyance of the land, together with all mines and minerals, under all the before mentioned copyhold hereditaments and premises. Anybody who got a subsequent conveyance of the freehold with the mines and minerals and registered it would get that which under this deed the copyhold tenant ought to get. Therefore, in my opinion, it cannot be said that a deed like this ought not to be registered under the Act.

The next question which has to be considered is this: Neither of the witnesses to the memorial was one of the witnesses to the execution of the deed of enfranchisement by the lords of the manor, but one of them was a witness to the execution by the grantees, and it is alleged that this is not sufficient. The requisitions of the 5th section of the Act are these: The memorial is to be "under the hand and seal of some or one of the grantors or some or one of the grantees," and it is to be "attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance, which witness shall, upon his oath before one of the said registrars or masters, or before a master in Chancery ordinary or extraordinary, prove the signing and sealing of such memorial and the execution of the deed or conveyance mentioned in such memorial." It is said that this must mean that he is to be a witness to the execution by the grantor, but in my opinion that is putting too narrow a construction on these words. According to ordinary language is not a witness to the execution of a deed

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by the grantee, even although his execution is not necessary, "a witness to the execution of the deed?" And in my opinion it would be wrong, unless we are bound by authority, so to narrow these words as to make them require the witness to be a witness to the execution of the deed by the grantor. It is remarkable that in this very section the Act draws a distinction between the grantors and the grantees, for it provides that the memorial must be executed by the grantors or one of them, or the grantees or one of them. If, then, it had been intended that it should be necessary for a witness to the memorial to have been a witness to the execution of the conveyance by the grantor, the section would, in my opinion, have said so, especially when we remember that if there was not a proper memorial any subsequent deed duly registered would get priority. We must remember that the object of this Act was not to secure the authenticity of deeds, but only to secure this, that when a man had executed a deed conveying the land there should be notice of it by its being entered on the register, and for that end it imposed upon the grantee this penalty: "If you do not put your deed upon the register any subsequent grantee who puts his deed on the register shall gain priority over you." Probably the reason for requiring some witness to the conveyance to be a witness to the memorial was that the memorial should be attested by somebody who saw that the conveyance was actually treated as an existing deed, which would prevent mere imaginary deeds being put upon the register, and so giving trouble to persons whose estates they purport to affect. My only doubt was in consequence of what had been stated by Lord St. Leonards in his book on Vendors and Purchasers (Sugden's Vendors and Purchasers, 11th ed. 970) and by the decisions in the Irish Courts. Lord St. Leonards was a very great lawyer, and it is remarkable that down to a certain period we find this expression in his book on Vendors and Purchasers, but when we come to the later editions (1) it was omitted, and it appears not to have been acceded to by conveyancers at that time as the correct view. In my opinion, if we think that he put too narrow a construction on the Act, however great a respect we have for him, we ought to decide according

(1) 12th ed. 579; 13th ed. 600; 14th ed. 730.

to our own opinion, and not according to that view which he threw out at one time, but afterwards did not continue to express. Then there are the decisions on the Irish Act. It may be that to a certain extent the judges were induced to come to those decisions by its being one of the declared objects of the Act to prevent forgeries. I do not, however, rely on that. If I felt bound by those decisions I should follow them notwithstanding that distinction, but we are not bound by them, and, although we ought to pay great respect to the opinion of the judges who decided those cases, yet here, not being bound by them, I think we ought to act on our own opinion, and this objection to the registration of the memorial in my opinion is not good.

We then come to the last objection, which possibly is not the least important in the eyes of those who have been arguing this case, or directing it to be argued. It is said that the oath as regards the execution of the memorial and the execution of the deed itself has not been taken before a proper person. The section requires that the witness "shall upon his oath before one of the said registrars or masters" (that is of the registrar for the registration of deeds), "or before a master in Chancery ordinary or extraordinary, prove the signing and sealing of such memorial and the execution of the deed of conveyance mentioned in such memorial." It was said that here the oath had not been taken before a master ordinary in Chancery or a master extraordinary in Chancery or before any person entitled to be considered as standing in the place of either of them.

We have, then, to consider what is the position of the gentleman before whom this oath has been taken. He was appointed under the Act 16 & 17 Vict. c. 78. We must look to that Act and that alone, for I cannot see that we are called upon to decide what would be the effect if the oath was taken before a person appointed under the Judicature Act, 1873, nor can I see any ground for saying that that Act deprives this gentleman of any power or authority which he had under the earlier Act. Originally there were the masters in Chancery, who took affidavits within a certain circle, which at first was five miles; then, I think, it was extended to twenty miles, and then cut down to ten miles. Those who took affidavits beyond that limit were

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masters extraordinary, and they had certain duties imposed upon them by orders of the Court of Chancery, some of which existed before the Middlesex Registry Act, some not till afterwards; but at the time when the Registry Act passed there was that distinction as regards affidavits between the ordinary masters in Chancery and the extraordinary. Then by 15 & 16 Vict. c. 80, the office of master in ordinary was abolished. After this came the Act 16 & 17 Vict. c. 78, the 1st section of which says: "The persons now styled masters extraordinary in Chancery shall cease to be so styled, and they and all persons hereafter appointed by the Lord Chancellor to execute like duties in England shall be designated 'Commissioners to administer oaths in Chancery in England,' and shall possess and exercise all such powers and discharge all such duties as now appertain to the office of master extraordinary in Chancery by virtue of any statute or order of the Court of Chancery, or the Lord Chancellor, or usage in that behalf or otherwise." It was argued by Mr. Channell that no power was given by this section to the persons who were to be called the commissioners to administer oaths in England, except such powers and duties as appertained to the office of the masters extraordinary in Chancery, and that the administering such an oath as that now in question was not in any way a duty or power appurtenant to that office, but simply appurtenant to the persons as personæ designatæ who occupied the office of masters extraordinary in Chancery; but that is not my view. I think that the Registry Act gave to the masters extraordinary in Chancery, as such, powers and duties in addition to the powers they had and the duties which they had to perform under the orders of the Lord Chancellor, and therefore that the true effect and construction of 16 & 17 Vict. c. 78, s. 1, is to give to the commissioners to administer oaths in England not only the powers and duties given to the masters extraordinary in Chancery under the orders of the Chancellor, but all those powers and authorities which were attached to that office, in which I include the power and duty of acting under the statute of Anne 7, c. 20, as successors of the former officers bearing that name. It was conceded that if this was one of the powers incident or appertaining to the office of master extraordinary it would pass under that section, and it

cannot reasonably be contended that it was not so. In fact the registrars do not raise any objection to affidavits sworn before commissioners to administer oaths in England beyond the limit of ten miles.

Then we have the question as to the London commissioners to administer oaths in Chancery, who are appointed under s. 2. Evidently s. 2 does not give to the London commissioners the duties which have to be exercised by the commissioners to administer oaths in England, because the commissioners for England are only to act beyond the limit of ten miles, and the London commissioners within the limit of ten miles. Taking it reasonably, we must hold that the 1st section gives to the commissioners to administer oaths in England the same powers as were formerly exercised by the masters extraordinary and within the same limits. Then s. 2 gives to the London commissioners the duty of exercising similar powers within their limit, that is within ten miles of Lincoln's Inn Hall, and as in my opinion the power to be exercised under the Registry Act of Queen Anne was given to the office as an additional duty imposed on those who held the office, and therefore appertaining to the office, a similar power to act under the Registry Act is given to the London commissioners where the masters in ordinary of the Court of Chancery, and not the masters extraordinary, would have had that power and that duty thrown upon them. Then s. 5 enacts "That nothing herein contained shall abridge or lessen the power of the Lord Chancellor as it now exists to appoint fit persons to administer oaths and take declarations, affirmations, and attestations of honour in Chancery, or to regulate the fees to be taken by them, and where any Act of Parliament refers to the masters extraordinary in Chancery or to their powers and duties, the reference shall be held to apply to and include the commissioners hereinbefore mentioned and their powers or duties, as the case may be." The Act 7 Anne, c. 20, refers to the masters extraordinary in Chancery. It is not a violent construction, and I think it is the reasonable construction of s. 5, confirming the view which I take of s. 2, that where the Act of Queen Anne had given certain powers to the masters extraordinary in Chancery there the commissioners appointed to take office in substitution

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for them should have that same power. I think, therefore, that this objection also fails, and that the appeal must be dismissed.

BOWEN, L.J. I do not desire to add anything upon the first or third points, as the Lord Justice has expressed everything which I could say, and I shall only touch on the second of the points argued before us, because we are giving a decision which is at variance, or apparently at variance, with *Jack* v. *Armstrong* (1), a case of some importance and some notoriety, which was decided by the Irish Court of Exchequer Chamber in the year 1828, on a different Act it is true, but on a parallel Act, an Act which has language almost identical with the Act we have to construe.

The point made by Mr. Channell and Mr. Trevelyan is this. They say that the witness who proved the deed was not a witness who would satisfy the conditions of the statute of Anne. Sect. 5, which provides that the memorial of the deed or conveyance is to be "under the hand and seal of some or one of the grantors or some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance." The appellants' counsel contend, with a good deal of force, that no one can fulfil that condition who is not a witness to the execution of the deed by the person from whom the estate moves. It seems to me certainly that the section is one of doubtful construction, but there are several reasons which make me think that the opposite view to that put forward by the appellants' counsel ought to be taken.

In the first place, there is nothing at all in the Act which says that the execution there mentioned is to be the execution by the person from whom the estate moves. The appellants' counsel ask us to read that into the Act. Now, in the ordinary sense of the term "witnesses to the execution of a deed" who are the witnesses to the execution of a deed which is executed by more than one party? Of whom is the class made up? It is made up, in the first place (where the deed is inter partes and between grantors and grantees only) of all the witnesses who see all the

(1) 1 Huds. & Br. 727.

grantors sign. As there may be many grantors, there may be many witnesses to their signatures and to the delivery of the deed; but the class is made up not only of them, but also of those who see the grantees sign. Put those two sets together, and you have got the witnesses to the execution of the deed. Now what does the section say? Having shewn in a previous sentence that the draughtsman had before his mind the importance of emphasizing, when it was necessary to emphasize it, the distinction between the grantor and the grantee—when the section comes to the witnesses to the execution of the memorial, which is to be executed by some or one of the grantors or some or one of the grantees, it simply says that one of the persons who are to prove this before the registrar is to be one of the witnesses to the execution of the conveyance. In the ordinary sense of language that requisition was amply satisfied by producing one of the class whom I have mentioned—one of those who saw the grantors sign, or one of those who saw the grantee sign.

With regard to the argument that the proving of the execution of the deed of conveyance is a duty which is imposed on the witness in question, and that a person cannot prove the execution of the deed of conveyance unless he is a person who saw the grantor execute it, the true answer to say seems to me to be that the "execution of the conveyance" in that part of the sentence means exactly the same as it does in the earlier part, neither more nor less, and that if you once arrive at the view that the execution of the deed which has to be witnessed by the person who proves the memorial is the execution *either* by the grantor *or* the grantee, then all he has got to prove is that which he really witnessed one of them do.

It appears to me, although, as I said before, this clause is one of doubtful construction, that we receive considerable guidance and light here from the preamble to the Act, which tells us what the true object of the Act is. The object of the Act is to prevent frauds committed by secret conveyances of lands, tenements and hereditaments by means of which persons "have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances." The object of the Act, therefore, is publicity and notice, so that all persons, when dealing with those

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who are in possession of property may be able to discover whether there have been any prior dealings with it. This object ought to be borne in mind in construing an Act like this. It is a statute which imposes forms and solemnities upon certain acts or contracts upon pain of forfeiture. It is, therefore, substantially in the nature of what is called ordinarily a penal Act. We ought not, I think, to give to an Act of this sort an operation more extensive than is necessary to carry out in its full the intention of the legislature in passing it, and if the intention of the legislature in passing it is to secure publicity, and to prevent secret and fraudulent conveyances, it seems to me that the object of the legislature is completely satisfied by placing on the words of "witness to the execution" the interpretation which I have mentioned. There, as it seems to me, lies the distinction between the Irish cases and this case. The Irish cases are upon an Act which, so far as this section is concerned, is exactly in the same terms. But what is the object of the Irish Act? The preamble shews that it was to secure not merely publicity but authenticity, genuineness—to strike not merely at secrecy, but to strike at forgery, and, as is well known, not only was the condition of things in Ireland at that time different from the condition of things in England, but great importance was attached by the legislature to the difference which existed between the state of the two countries. As the object of the Irish statute was not merely to secure publicity, it may well be that the Court thought that if the wider construction which we are now adopting were put upon the words "witnesses to the execution," the entire objects of the legislature would not be secured, because it is obvious that a precaution against forgery would thus have been omitted. If proof of the execution by the grantee only were sufficient, there would be no security as to the genuine execution by the grantor, and it may be on that ground that the Court of Exchequer Chamber felt themselves bound to come to the conclusion to which they did in the case of *Jack* v. *Armstrong* (1), which was afterwards followed in *Re Stephens.* (2)

With regard to the observations of Lord St. Leonards, I have nothing to add to what has fallen from the Lord Justice.

(1) 1 Huds. & Br. 727.

(2) Ir. Law Rep. 10 Eq. 282.

It seems to me, for these reasons, that the judgment of the Court below is right, and ought to be affirmed.

FRY, L.J. My opinion so exactly coincides with that of my learned brethren, and the matter has been so fully discussed by them, that I shall content myself by expressing my concurrence.

Appeal dismissed.

Solicitors for appellant: *Wainwright & Baillie.*
Solicitors for respondent: *Munton & Morris.*

H. C. J.

THE QUEEN *v.* COMMISSIONERS OF INLAND REVENUE.

April 23; *May* 7.

Licensing Acts—Intoxicating Liquors — Licence — Theatre — Place of Public Entertainment—5 & 6 Wm. 4, c. 39, s. 7—Licensing Act, 1872 (35 *& 36 Vict. c.* 94), *ss.* 3, 72, 74.

By 5 & 6 Wm. 4, c. 39, s. 7, it shall be lawful for the Commissioners of Excise to grant retail licences to any person to sell beer, wine, and spirits "in any theatre established under a royal patent, or any theatre or place of public entertainment licensed by the Lord Chamberlain or by justices of the peace," without the production by the applicant of any certificate or authority for him to keep a common inn, ale-house, or victualling-house.

By the Licensing Act, 1872, s. 3, no person shall sell any intoxicating liquor without being duly licensed, or at any place where he is not authorized by his licence to sell the same, under specified penalties, and by s. 74 "license" means a licence for the sale of intoxicating liquors granted by justices under the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts.

By s. 72: "Nothing in this Act shall affect or apply to" (inter alia) "the sale of intoxicating liquors by proprietors of theatres in pursuance of the Acts in that behalf:"—

Held, that, since the passing of the Licensing Act, 1872, the Commissioners had no power to grant an excise licence, under 5 & 6 Will. 4 c. 39, s. 7, to the proprietors of a place of public entertainment licensed by justices for music and dancing under 25 Geo. 2, c. 36, and having no justices' licence or certificate for the sale of intoxicating liquors.

ORDER nisi for a mandamus, obtained by the proprietors of a building known as the Empire Theatre, calling upon the Commissioners of Inland Revenue to shew cause why they should not grant an excise licence, under 5 & 6 Wm. 4, c. 39, s. 7, for the sale by retail of beer, wine, and spirits upon the premises.

In October, 1887, a music and dancing licence in respect of the

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Empire Theatre was granted to the applicants by the justices of Middlesex at quarter sessions.

Application having been made to the commissioners for an excise licence under 5 & 6 Wm. 4, c. 39, s. 7, they doubted whether, in view of the provisions of the Licensing Act, 1872 (35 & 36 Vict. c. 94), they had power to grant an excise licence for the sale of beer, wine, and spirits in respect of a building like the one in question, which, though licensed for music and dancing, was neither established by royal patent nor licensed by the Lord Chamberlain as a theatre; and this application for a mandamus was accordingly made.

Sir E. Clarke, S.G. (*Sir R. E. Webster, A.G.*, and *A. V. Dicey*, with him), shewed cause for the Commissioners of Inland Revenue. It is submitted that the Commissioners have no jurisdiction to issue a licence in respect of this building, which is not a theatre established by royal patent, nor licensed as a theatre or place of public entertainment by the Lord Chamberlain, nor do the applicants hold any justices' licence or certificate for the sale of intoxicating liquors. The Licensing Act, 1872, contains, first, a direct prohibition against the sale of intoxicating liquors by any person who is not duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. Except, therefore, so far as the saving clause (s. 72) applies, the statute impliedly repeals the provisions of s. 7 of 5 & 6 Wm. 4, c. 39. That saving clause in the Act of 1872 applies only to the sale of intoxicating liquors by proprietors of theatres "in pursuance of the Act in that behalf," i.e. in pursuance of the Act 5 & 6 Wm. 4, c. 39 and the Act of 1872. The definition of "license" in the Act of 1872 does not include the licence held by the applicants in the present case; so that this building not being a theatre, nor licensed by justices under the Wine and Beer-house Acts, the applicants are prohibited from selling intoxicating liquors. In s. 72 of the Act of 1872 the words, "or place of public entertainment," were expressly omitted, shewing that the legislature had in view the provisions of s. 7 of 5 & 6 Wm. 4, c. 39.

[The Solicitor-General also contended that a mandamus could not be granted against the Commissioners as servants of the

Crown, and that the Commissioners had a discretion with respect to granting licences for the retail sale of beer, wine, and spirits under 5 & 6 Wm. 4, c. 39, s. 7. But during the course of the argument, and for the purposes of the present case only, he waived the point whether a mandamus would lie, following the precedent for that course in *Reg.* v. *Commissioners of Stamps* (1), and he conceded that if the Commissioners had thought that they had jurisdiction they would have exercised their discretion in favour of the applicants.]

Sir C. Russell, Q.C., and *Forrest Fulton*, for the applicants, in support of the order. It is now conceded on behalf of the Commissioners that they have authority to grant the licence under 5 & 6 Wm. 4, c. 39, s. 7, unless that authority is taken away by the Licensing Act, 1872. Sect. 3 of that statute is no more than a general provision directed against "illicit sales." It does not affect the powers of any licensing authority. Sect. 72 contains only a saving clause from that provision. That section begins, "Nothing in this Act shall affect or apply to," &c. The Act does not intend to repeal the provisions of 5 & 6 Wm. 4, c. 39, s. 7, with respect to places of public entertainment other than theatres. There is no repeal by express words, and the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35), Sched., expressly repeals ss. 1, 2, and 8 of 5 & 6 Wm. 4, c. 39, but leaves untouched s. 7. The object and scope of the Act of 1872 was not in any way to limit the powers of licensing authorities. That is shewn by the headings of the various divisions. The Act deals with "illicit sales," with offences against public order on licensed premises, with questions of control in respect of closing such premises in times of riot and disorder, with questions of adulteration, of misconduct by repeated convictions of the holder of the licence, of entry upon the premises, of registry, and of appeals. The saving clause enacts that nothing in the Act shall affect or apply to certain privileges enjoyed at the passing of the Act by the universities and other specified bodies, and the selling of intoxicating liquors "by proprietors of theatres in pursuance of the Acts in that behalf." It is said that by reason of those words there is an implied repeal of s. 7 of the 5 & 6 Wm. 4, c. 39, so far

(1) 9 Q. B. 637.

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as that section applied to places of public entertainment other than theatres. But it is submitted that the word "theatres" is used in s. 72 of the Act of 1872 in its popular sense as expressing generally the class of buildings used for public entertainments. There was justification for using it in that sense, because in s. 7 of 5 & 6 Wm. 4, c. 39 the words are, "in any theatre established under a royal patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain." Thus, theatres are treated as one class of places of public entertainment. There is no technical or statutory definition of "theatre." It is a word which the legislature might well have used as expressing in popular language any place where there are spectacular shows or singing or dramatic pieces. If the contention made for the Commissioners be correct, the moment the statute of 1872 received the royal assent, which was on August 10, 1872, every sale of intoxicating liquor in a place of public entertainment became an illicit sale within the meaning of the Act, and therefore subject to a penalty. The proprietors of such places could not get the authority of the justices for such sales until the following March or April, and it is impossible to suppose that the legislature could have intended that consequence to happen without making some interim provision for the protection of such places. There is no good reason why the legislature should have intended to exclude places of public entertainment from the operation of the saving clause in the Act of 1872. The Licensing Act (Ireland), 1874 (37 & 38 Vict. c. 69), dealing with the same subject-matter as the Licensing Act, 1874, enacts by s. 7 that it shall not be lawful for any person under the authority of any licence in pursuance of 5 & 6 Wm. 4, c. 39, to sell by retail any intoxicating liquors elsewhere than within the part or parts of the theatre "or other place of public entertainment" which shall be specified in such licences. It can hardly be supposed that the legislature meant in the Licensing Act, 1872, to repeal the provisions of 5 & 6 Wm. 4, c. 39 with respect to places of public entertainment when you find them two years afterwards dealing with the same subject-matter and recognising that excise licences could still be obtained under that statute with respect to places of public entertainment in Ireland.

Sir E. Clarke, S.G., in reply. There were good reasons why the legislature should have omitted the words "or other place of public entertainment" from s. 72 of the Licensing Act, 1872. By that Act all licensing powers were being brought to the justices, and a new code, embracing new powers of control and regulation over licensed houses, is intended to be constituted. Thus by s. 16 police constables have power to enter licensed premises, and penalties are imposed in respect of offences committed there; and it may well be that the legislature thought that such powers and penalties should be applied to places of public entertainment, whilst theatres established by letters patent, or licensed by the Lord Chamberlain, should be exempted. There is a well-defined distinction between theatres and other places of public entertainment drawn in the statutes relating to those places. The 10 Geo. 2, c. 28, and 6 & 7 Vict. c. 68 (amongst other statutes) describe theatres as places for the public performance of interludes and stage plays. The later of those Acts provides for the licensing of theatres in London and Westminster by the Lord Chamberlain, and outside those limits by the justices; and provides rules for the control and regulation of both those classes of theatre. 25 Geo. 2, c. 36, s. 2, provides for the licensing in London and Westminster of places of public entertainment; and s. 4 expressly excepts theatres and places of public entertainment "exercised and carried on under letters patent, or licence of the Crown, or licence of the Lord Chamberlain." It is clear, therefore, that the legislature in 1872 had clearly in mind the distinction between theatres and places of public entertainment in London and Westminster. It is clear that the words "or other places of public entertainment" were intentionally left out in the saving clause in the Act of 1872 in order to bring those places under that Act. As to the Licensing Act, 1874 (Ireland), the last sentence of s. 77 of the Licensing Act, 1872, has the effect of keeping 5 & 6 Wm. 4, c. 39, s. 7 in force in Ireland. There is nothing, therefore, inconsistent in the language of the Act of 1874.

[He was stopped.]

FIELD, J. I am of opinion that this order should be discharged. It is an order calling upon Her Majesty's Commissioners

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of Inland Revenue to shew cause why they should not grant an excise licence to the applicants. The state of facts under which the question arises is this:—The applicants are the proprietors of the Empire Theatre, which, although it is called a theatre, is not a theatre established under any royal patent, nor licensed by the Lord Chamberlain, nor is it a theatre licensed by justices of the peace, but it is a place of public entertainment which has been licensed for music and dancing by justices of the peace under 25 Geo. 2, c. 36. It is conceded by the Commissioners that if the 5 & 6 Wm. 4, c. 39 stood alone, and there had been no other legislation on the subject, and if they had had the power, they would without demur have granted a licence to the keepers of the Empire Theatre. No reflection whatever is suggested upon the applicants. It is not suggested that their conduct has been in any way improper, or that they were not proper persons to receive a licence, or that their premises were not fit premises for the sale by retail of exciseable liquors. The difficulty which the Commissioners have felt has arisen upon the legislation of 1872. The Commissioners have been advised that, under that legislation, they have no power to grant the licence which is applied for, and they were desirous of obtaining the decision of this Court upon the question whether or not they were justified in their refusal to grant it. At one time I thought that the point would become important that we had no power to issue a mandamus to Her Majesty, or those who represent her. But the Solicitor-General has waived that objection for the purposes of the present case. Our decision, therefore, is not to be taken as in any way having disposed of that point, in case it should be thought proper to raise it in any future case. In order to appreciate the effect of the legislation of 1872, it is necessary to consider what has been the course of legislation prior and up to the time when that Act was passed. Now the Act of 1828 (9 Geo. 4, c. 61) dealt with three particular classes of people—keepers, or people about to be keepers, of inns, ale-houses, or victualling-houses. It consolidated, as it were, these three classes of people, and said most distinctly that they must not sell exciseable liquors by retail without having the licence of the justices to be granted at the general annual licensing meeting. But that licence of the justices does

not of itself enable the keepers of those inns, ale-houses, and victualling-houses to sell beer, cider, and other things of the same kind, because they are all exciseable liquors in respect of which Her Majesty receives a large revenue, and therefore by the statute of 1828 it was provided that no person should sell exciseable liquors without having obtained an excise licence for that purpose. By s. 17, no licence for the sale of exciseable liquors by retail to be drunk or consumed on the premises shall be granted by the Commissioners of Excise, unless the applicant has previously obtained from the justices the ale-house licence under the same Act, and s. 18 enforces that provision by providing a penalty. Now "exciseable liquors" are defined by the statute. They are, shortly stated, any liquors in respect of which Her Majesty is entitled to receive or charge a customs or excise duty. That state of things existed up to the year 1830. In that year the legislature took out three particular exciseable liquors—beer, ale, and porter, and for the first time authorized the sale of them upon premises which should be the subject of an excise licence only. In effect the enactments 11 Geo. 4 & 1 Wm. 4, c. 64, enabled a person to go to the Commissioners and say, "I require you to give me a licence to sell beer, ale, and porter upon these particular premises of mine." In and subsequent to the year 1830 that right was general. It was unrestrained by any condition, and any person could exercise it. But in 1834, the evils of permitting an unrestrained sale of that character presented themselves to the legislature, and they then, by 4 & 5 Wm. 4, c. 85, imposed a condition that no such excise licence should be granted unless the applicant obtained a certificate of good character, which was to be deposited with the Commissioners of Excise, signed by six rated inhabitants of the parish, and certified by one of the overseers. Now in 1835, the statute 5 & 6 Wm. 4, c. 39, was passed, which by s. 7 enacted—not that licences might be granted in respect of all exciseable liquors, nor of all intoxicating liquors—but only that it should be lawful for the Commissioners of Excise to grant retail licences to any person to sell beer, wine and spirits "in any theatre established under a royal patent, or in any theatre or place of public entertainment," without the production of any licence, certificate, or authority to sell the same.

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Next came the Act of 1872, which was a well-considered enactment, and brought into one code all intoxicating liquors, a new set of people and houses, and a new set of saleable articles. The preamble states, "whereas it is expedient to amend the law for the sale by retail of intoxicating liquors"—it is to be observed here that particular kinds of liquors are no longer specified—"and the regulation of public-houses"—and the words which follow are important—"and other places." The legislation of 1828 was directed to particular kinds of places, namely, inns, ale-houses, and victualling-houses. The legislation of 1830 introduced a different place, namely, a beer-house. The Act of 1872 sought to strike, not only at public-houses, but at all other places in which intoxicating liquors are sold; and it further enacted, under the heading, "Illicit sales"—which means unlawful sales—that "no person shall sell or expose for sale by retail any intoxicating liquors without being duly licensed to sell the same." The definition clause clears up doubts as to the meaning of this language which might otherwise have been open to considerable discussion. In effect it makes "intoxicating liquors" and "exciseable liquors" identical in their definition, for it says that "intoxicating liquors" shall mean "spirits, wine, beer, porter, &c., and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the Commissioners of Inland Revenue." The word "license" is defined to mean, not any licence, but "a license for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beer-house Acts." It means, therefore, a licence for the sale of intoxicating liquors. But the legislature thought it necessary to make certain exceptions from the general prohibition contained in the Act. Accordingly there are exceptions in respect of the privileges enjoyed by the chancellors and scholars of universities in England, and by the Vintners Company in the city of London, and in respect of other specified persons and things, and then comes this important exception, "the sale of intoxicating liquors by proprietors of theatres in pursuance of the Acts in that behalf." Now the present application is not by the proprietors of a theatre. It is

by persons who are the proprietors of a building which they hold merely as a place of public entertainment licensed for music and dancing by the justices.

It is clear, therefore, that reading the words "by the proprietor of any theatre" in their natural and ordinary sense, they would not include the present applicants. It was said that they must be read, not in their ordinary and natural sense, but in which was called, I think, a popular sense, which sense it was argued would include the present applicants. It was said that under the word "theatre" you must include a place of public entertainment. I think that that contention is disposed of at once by reference to the language of the 5 & 6 Wm. 4, which draws a clear distinction between "theatres" and "other places of public entertainment." The argument for the applicants was attempted to be strengthened by the contention that in the Act of 1835 you find express provisions declaring the intention of the legislature to give proprietors of places of public entertainment the right to obtain an excise licence to sell beer, wine, and spirits upon them, and you find no clear language in the Act of 1872 repealing those provisions. But it is a maxim of construction that where the provisions in two Acts of Parliament are clearly inconsistent, then there is of necessity an implied repeal of the inconsistent provisions of the earlier Act. If the Act of 1872 had not brought in new elements of legislation the argument would perhaps have been strong that, as the later Act contained no new provisions with respect to control and regulation and the like, you might say that it did not contain any implied repeal of the provisions of the earlier Act in this respect. But I am satisfied that the Act of 1872 did include a great quantity of new legislation. New elements of control and regulation were brought in, all of which seem to me clearly to indicate the express determination of the legislature that no sale of these liquors should take place unless certain events occurred, which have no existence here unless you can alter the language of s. 72, and say, as we were asked to say, that the words "or other place of public entertainment" should be read into that section. I think that to read in those words would be going far beyond any recognised rule of construction. I think that by the Act of 1872 the legislature intended

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to create a new code, with new penalties and disabilities in respect of articles and places themselves, and that they did not intend to except places of public entertainment from the prohibition against selling intoxicating liquors. If that had been their intention they would have said so in express words. At first sight it was somewhat difficult to see the reason why places of public entertainment should be dropped out of the privilege granted by 5 & 6 Wm. 4, c. 39, and continued with respect to theatres by the Act of 1872. But the Solicitor-General satisfied me that there might have been many reasons for the changes introduced by the new legislation. With respect to the intention of the legislature, we are not at liberty to interpret it otherwise than as it is expressed in the language they have used. I think the language used is in this case clear, and for these reasons I am of opinion that this order must be discharged.

WILLS, J. I am of the same opinion. This case, which has received a very full discussion, appears to me to be perfectly plain, and I am of opinion that the position taken up by the Commissioners is well founded. Shortly stated, the effect of the legislation is this: Before the Act of 1834 (4 & 5 Wm. 4, c. 85) the proprietor of a theatre, or a place of public entertainment, if he wanted to sell beer or cider on the premises must have had an excise licence. Then by 4 & 5 Wm. 4, c. 85, in order to obtain that excise licence he must obtain a certificate of character in the prescribed mode. Next, the 5 & 6 Wm. 4, c. 39, provided that, notwithstanding that prohibition, it should be lawful for the Commissioners of Excise in the cases of theatres established by royal patent, or theatres or other places of public entertainment licensed by the Lord Chamberlain or justices of the peace, to grant an Excise licence for the sale by retail of beer, wine, and spirits without the production of any justices' licence, or any certificate or authority to keep a common inn, ale-house, or victualling-house. From that time down to 1872 the proprietor of a place of public entertainment was entitled to require the Commissioners of Excise to grant a wine, beer, and spirit licence without producing any such licence or certificate or authority. Then came the Act of 1872, and the terms of that Act are, it appears to me,

too clear for mistake or qualification. By s. 3 no person shall sell intoxicating liquors, which comprehend the three excisable liquors I have just named (besides a great number of other liquors), without being duly licensed to sell the same. By the definition clause a person licensed means a person who has a licence from the magistrates under the Act of 1828; and but for the exemption in favour of proprietors of theatres in this respect it is clear that under the Act of 1872 neither the proprietor of a theatre, nor of a place of public entertainment other than a theatre not duly licensed by justices for the sale of intoxicating liquors, would be entitled to an excise licence. But the exempting clause (s. 72) seems to me equally free from doubt. It provides that nothing in the Act shall affect or apply to "the sale of intoxicating liquors by proprietors of theatres in pursuance of the Acts in that behalf." The present applicants are not proprietors of a theatre. They are proprietors of a place of public entertainment; and the distinction between the two is perfectly well-established and recognised in the statutes relating to both classes of place. I am of opinion that the applicants are not within the saving clause. They are therefore affected by the legislation of the Act. That legislation is inconsistent with the provisions in this respect of the Act of 1835, which provisions are therefore pro tanto repealed. I agree that this order should be discharged.

Order discharged.

Solicitor for Commissioners: *The Solicitor to the Inland Revenue.*
Solicitor for appellants: *Tyrrell Lewis.*

W. A.

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April 20, 21, 30.

[IN THE COURT OF APPEAL.]

IN RE McHENRY. EX PARTE McDERMOTT.

Bankruptcy—Liquidation Petition—Acceptance of Composition—Default in Payment of Composition—Adjudication of Bankruptcy—Relation back of Title of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 11, 126.

When a debtor is adjudged a bankrupt under the special power conferred on the Court by the last clause of s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), (corresponding to s. 18, sub-s. 11, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52)), there is no relation back of the title of the trustee in the bankruptcy to the filing of the debtor's petition or to any other prior act of bankruptcy.

APPEAL against an order made by the registrar that E. McDermott should pay to the trustees under the bankruptcy 2251*l.* 1*s.* 10*d.*, part of a sum of 5765*l.* 6*s.* 8*d.* received by him from the bankrupt on August 28, 1884.

The bankrupt on August 15, 1879, filed a liquidation petition under the Bankruptcy Act, 1869.

The first meeting of the creditors was held on October 20, 1879. It was then adjourned, and, after a number of successive adjournments, ultimately, on October 22, 1883, resolutions were passed by the creditors accepting a composition of 20*s.* in the pound, payable in four instalments of 5*s.* each, the first instalment to be paid within eight months after the registration of the resolutions, and the subsequent instalments to be paid respectively within twelve, eighteen, and twenty-four months after the payment of the first instalment. The resolutions were duly confirmed, and were registered on November 13, 1883.

The first instalment of the composition became due on July 13, 1884, but was not paid. On March 25, 1886, the bankrupt was adjudicated bankrupt, under the power conferred on the Court by the last clause of s. 126 of the Bankruptcy Act, 1869.

It appeared that on July 12, 1884, the bankrupt had executed a deed by which he assigned to McDermott the proceeds of the surrender of certain policies of assurance belonging to him, upon trust to make certain payments specified in the deed, and to retain the balance towards payment of certain advances and payments in the deed stated to have been made by McDermott to

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and on account of the bankrupt. The proceeds of the policies were received by McDermott on August 28, 1884, and, after making the payments mentioned in the deed, he applied the balance in accordance with the directions of the bankrupt. The sum of 2251*l.* 1*s.* 10*d.*, which the registrar ordered McDermott to pay to the trustees, represented the amount of some of the payments which he had thus made under the directions of the bankrupt. McDermott had notice of the composition proceedings.

The registrar made the order, on the ground that the title of the trustees in the bankruptcy related back to the act of bankruptcy committed by the bankrupt in the filing of the liquidation petition.

McDermott appealed.

Sir H. Davey, Q.C., Cooper Willis, Q.C., and *F. Cooper Willis*, for the appellant. The title of the trustee under an adjudication of bankruptcy made by the Court, in the exercise of the power conferred by the final clause of s. 126 (1) of the Bankruptcy Act,

(1) Sect. 6 of the Bankruptcy Act, 1869, provides that a creditor to whom a debt of not less than 50*l.* is due, may present a petition praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of certain specified acts or defaults called "acts of bankruptcy" (inter alia):

"(4.) That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts."

"But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication."

Sect. 11: "The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication."

Sect. 126 provides: "The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. . . . . If it appear to the Court, on satisfactory evidence, that a composition

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1869, has no relation back to any prior act of bankruptcy committed by the debtor. The resolution passed by the creditors accepting a composition makes the debtor entire master of his property, and able to deal with it just as if he had not committed any act of bankruptcy. The adjudication under s. 126 is made under a discretionary power given to the Court; it is not like an ordinary adjudication, to which a creditor is entitled ex debito justitiæ on proof of the statutory requisites: Bankruptcy Act, 1869, ss. 6, 11, 126; *Ex parte Charlton* (1); *In re Kearley & Clayton's Contract* (2); *Sharp* v. *McHenry* (3); *Ex parte Hoare* (4); *Ex parte Games.* (5) The adjudication is not made with reference to any act of bankruptcy; the original act of bankruptcy committed by the filing of the petition is wiped out by the acceptance of the composition; it is no longer "available for adjudication." If the debtor is not free to deal with his property he will not be able to pay the composition, and, if any dealing with it could be set aside after any number of years, no one would be able to deal with him.

But, assuming that the title of the trustees does relate back to the filing of the petition, money paid by a mere agent of the debtor by his directions cannot be recovered from the agent: *Ex parte Dewhurst.* (6)

Sir H. James, Q.C., Winslow, Q.C., and *Sidney Woolf,* for the trustees in the bankruptcy. Even though McDermott was a mere agent of the debtor, he is not protected if he was dealing with the

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under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

Rule 252 of the Bankruptcy Rules, 1870, provides that proceedings under ss. 125 and 126 of the Bankruptcy Act, 1869, "shall be instituted by the debtor by petition and affidavit thereto annexed according to the forms given in the schedule."

The form of petition (No. 106), given in the schedule, contains a statement "your petitioner alleges that he is unable to pay his debts."

Sect. 18 of the Bankruptcy Act, 1883, contains (sub-s. 11), a power for the Court to adjudge a debtor, whose creditors have resolved to accept a composition or scheme of arrangement, bankrupt, similar to the power conferred by s. 126 of the Bankruptcy Act, 1869.

(1) 6 Ch. D. 45.
(2) 7 Ch. D. 615.
(3) 38 Ch. D. 427.
(4) Law Rep. 16 Eq. 625.
(5) 12 Ch. D. 314.
(6) Law Rep. 7 Ch. 185.

money of the trustees. He had notice of the act of bankruptcy, and he knew that the composition had fallen through. In *Ex parte Hoare* (1) the time fixed for the payment of the composition had not expired; the creditor had no notice of an act of bankruptcy "available for adjudication," and valuable consideration was given. If after the filing of a liquidation petition the creditors resolve on a liquidation by arrangement, the title of the trustee in the liquidation relates back to the filing of the petition: *Ex parte Duignan.* (2) If the creditors resolve on a composition the debtor is free to deal with his property until the composition is superseded by an adjudication of bankruptcy; when that takes place the original act of bankruptcy revives. When default is made by the debtor in payment of the composition there is "sufficient cause" for the exercise of the power to adjudge the debtor a bankrupt, and the original act of bankruptcy becomes "available for adjudication." Any person who then, with notice of the act of bankruptcy and of the default, deals with the property of the trustee is not protected by ss. 94 and 95. It is clear that McDermott knew of the filing of the petition; at all events the onus is on him to shew that he had no notice: *Ex parte Schulte* (3); *Ex parte Vale* (4); *Ex parte Cartwright* (5); *Ex parte Snowball.* (6) It is clear also that McDermott knew that the composition would not be paid when it was due, and that the original act of bankruptcy would become available for adjudication. The original act of bankruptcy was suspended for a time, but, when the composition arrangement fell through, it became again an act of bankruptcy "available for adjudication." *Sharp* v. *McHenry* (7) is not binding on this Court.

Without an act of bankruptcy a man cannot be adjudicated a bankrupt. The title of the trustees must prevail against a person who had notice of the original act of bankruptcy: *Barron* v. *Ehlers* (8); *King* v. *Leith.* (9) *Ex parte Helder* (10), is distinguishable, for there the act of bankruptcy was not complete until the payment had been made by the agent. The limitation of time

(1) Law Rep. 16 Eq. 625.
(2) Law Rep. 6 Ch. 605.
(3) Law Rep. 9 Ch. 409.
(4) 18 Ch. D. 137.
(5) 44 L. T. (N.S.) 883.
(6) Law Rep. 7 Ch. 534.
(7) 38 Ch. D. 427.
(8) 1 Cab. & E. 432.
(9) 2 T. R. 141.
(10) 24 Ch. D. 339.

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imposed by s. 6 applies only to a bankruptcy founded on a creditor's petition.

Cooper Willis, Q.C., in reply.

1888. April 30. LORD ESHER, M.R. (after stating the facts, continued) :—The trustees in the bankruptcy contend that the bankruptcy of 1886 relates back to the act of bankruptcy of August, 1879, and that that is the result of the true construction of the 126th section. If this had been an ordinary bankruptcy under the former sections of the Act, under ss. 6 and 11 there could have been no relation back to that act of bankruptcy; it would have been far too old. But, in my opinion, an adjudication of bankruptcy under the last clause of s. 126 is not made upon an act of bankruptcy at all.

The first clause of s. 126 provides that the creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor; the composition is to be accepted in satisfaction of the debts, and rule 252 of the Bankruptcy Rules, 1870, provides that proceedings under s. 126 shall be instituted by the debtor by petition stating that he is unable to pay his debts.

What is the result of that? Does it leave the debtor at liberty to deal with his property just as if there had been no petition? If it does not, how could anyone deal with him? The fact that he has presented a petition must be known to almost every one who would have dealings with him, who would therefore know of the act of bankruptcy caused by the petition, and that, therefore, they could not deal with him safely, unless the composition resolutions had been passed. Why are they passed? The resolutions are passed in order that the debtor may deal with his property, and, according to *In re Kearley and Clayton's Contract* (1), which I think was rightly decided, the very object of the power given to creditors to resolve to accept a composition instead of a bankruptcy, and the effect of the resolution, is, to give the debtor complete dominion over his property and full power to dispose of it. Therefore, in my view, under the first clause of s. 126, the extraordinary resolution enables the debtor to deal with all his

(1) 7 Ch. D. 615.

property until something else happens, which I will mention presently, just as if he had full dominion over his property in every way, and every one who deals with him during that interval must be perfectly safe. Otherwise the composition resolutions might place the debtor in difficulties which would make it almost impossible for him to pay the composition which the creditors are willing to accept.

What, then, is the effect of the adjudication of bankruptcy, which is referred to in the last clause of s. 126? "If it appear to the Court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt."

What has the Court to inquire into there? That it should inquire whether there had been an act of bankruptcy—an act of bankruptcy consisting of the filing of a petition—would be idle, because there must have been a liquidation petition, and that petition must have been an act of bankruptcy. The petition is the very foundation of the action of the Court in the whole matter, and, therefore, the Court does not want "satisfactory evidence" of that.

What is it, then, that the Court has to inquire into? The debtor, besides the filing of the petition, may have committed fifty other acts of bankruptcy, and that to the knowledge of all his creditors, but still they come to the resolution that they will not make him a bankrupt. They do this, I suppose, for their own benefit as much as for his, and with full knowledge of the facts they agree to the composition. The adjudication of bankruptcy under s. 126 is to be made "on satisfactory evidence"—not that the debtor has committed an act, or twenty acts, of bankruptcy—they are all swept away by the resolutions of the creditors; but that, "in consequence of legal difficulties, or for any sufficient cause." the composition cannot proceed without injustice or undue delay. The debtor may have been perfectly willing to pay the composition, and yet, owing to some "legal difficulty," it may have become impossible for the composition arrangement to be carried into effect without injustice or undue delay. To whom? To the creditors or to the debtor." It seems to me that the

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adjudication of bankruptcy is to be made on "satisfactory evidence"—not of any act of bankruptcy—but of things which may have happened in perfect innocence, and which may make it unjust to the debtor or to the creditors that the composition should be carried out, and then the Court "may adjudge the debtor a bankrupt." This adjudication, therefore, is not made upon or in consequence of any act of bankruptcy. The liquidation petition must, no doubt, exist in order to give the Court jurisdiction; it is a causa sine qua non, but it is not the causa causans of the adjudication. The bankruptcy is wholly distinct from the bankruptcies referred to in ss. 6 and 11, which are founded upon the commission of an act of bankruptcy, and which may relate back to prior acts of bankruptcy; whereas this adjudication is made without regard to any act of bankruptcy. There must have been an act of bankruptcy in order to give the Court jurisdiction, but that act of bankruptcy has not to be considered in any way by the Court in making the adjudication under s. 126.

LINDLEY, L.J. We are asked to hold as a matter of law, apart from any question of fraud, that the adjudication of bankruptcy made against McHenry on March 25, 1886, relates back to August, 1879, when he presented his liquidation petition, that is to say, for nearly seven years. That is a somewhat startling proposition. The doctrine of relation back is based entirely upon statutory enactment, and the period limited by s. 11 is twelve months, and that is the only material section for consideration. Mr. Winslow must bring himself within that section in order to support his proposition. I think Mr. Willis was right in saying that the last clause of s. 11 does not carry the relation back more than twelve months. "Any prior act of bankruptcy," means any act of bankruptcy prior to the act mentioned in the first part of the section, but within twelve months next preceding the adjudication. I think that is the true construction. But the present case turns upon the construction of the first clause of s. 11—that "the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt."

Now what was the act of bankruptcy upon which McHenry was adjudicated a bankrupt? Can it be seriously contended that he

was adjudicated a bankrupt upon the presentation of the liquidation petition in August, 1879? He might, no doubt, have been adjudicated a bankrupt upon that act of bankruptcy, if a creditor had presented a petition within six months under s. 6: but to say that he was in fact adjudicated a bankrupt on that act of bankruptcy, meaning that that was the ground of the adjudication, appears to me contrary to the truth. The ground of the adjudication was, that there was a difficulty in carrying out the composition. It is true that there would have been no composition but for the liquidation petition; but it is a mere play on words to say that the debtor was adjudicated a bankrupt on the liquidation petition. Test it in this way. Suppose the Court had been asked by any creditor in 1886 to adjudicate the debtor a bankrupt upon the act of bankruptcy committed by him in August, 1879, the application would have been treated as ridiculous. It is obvious that the debtor was not adjudicated a bankrupt upon that act of bankruptcy in any proper sense of the words: he was adjudicated a bankrupt under s. 126, because the Court was satisfied that the composition could not proceed. This is the view which has been taken of s. 126 for some years past, first of all, I think, in *Ex parte Charlton* (1), and I am satisfied that it is the true construction of the Act. The contrary view would render the whole of the composition clauses utterly unworkable. What is the theory of those clauses? It is that, in consideration of not being adjudicated a bankrupt, the debtor, either with or without the aid of his friends, will pay a composition on his debts, and he is to remain master of his property. He is to be able to deal with it, sell it, get it in, and apply it in the best way he can, for the purpose (amongst other things) of enabling him to pay the composition. The whole theory of composition, as distinguished from liquidation, would be utterly unworkable if the ordinary doctrine of relation back applied to it. Mr. Winslow says that that would not be so, because of ss. 94 and 95, which will protect transactions entered into without notice of an act of bankruptcy available for adjudication. But the language of those sections, as well as the reason of the thing, shews that they do not come into operation at all until you get the relation back. The protecting clauses are not wanted, unless the doctrine of relation back applies, and, although it is con-

(1) 6 Ch. D. 45.

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ceivable that, if s. 11 did apply, the protecting clauses would also apply, and might make the composition workable (though I really doubt this), still the answer is, that the protecting clauses have no application, because there is no relation back. This view of s. 126 is not taken by this Court now for the first time. The same view was taken by Malins, V.C., in *In re Kearley & Clayton's Contract* (1), and by Kay, J., in *Sharp* v. *McHenry*. (2) There is a marked difference—a difference in substance—between a composition under s. 126 of the Act of 1869, and the somewhat similar proceedings for liquidation by arrangement under s. 125. Under a liquidation by arrangement the doctrine of relation back is clearly introduced; the theory of liquidation is different from that of composition. Under s. 125 the whole property of the debtor is taken out of him and vested in a trustee. Under s. 126 his property is left in him, and he is trusted by his creditors to deal with it as he likes, and to make the payments agreed upon. The transaction between McHenry and the appellant is a very suspicious one, but we must act according to law, and, inasmuch as no case is raised under the statute of Elizabeth, or under s. 91 of the Act of 1869, but we are asked to decide against the appellant on this abstract point of law, it appears to me that the point of law is in his favour and that we must allow the appeal.

BOWEN, L.J. I am of the same opinion, and I have nothing to add

Appeal allowed.

Winslow, Q.C., asked for leave to appeal to the House of Lords.

THE COURT refused the application.

Solicitors for appellant: *John Holmes & Son.*
Solicitors for trustees: *Munns & Longden.*

(1) 7 Ch. D. 615. (2) 38 Ch. D. 427.

W. L. C.

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BENEFIT SOCIETY—*Insurance—Administration—Death of Member intestate—Payment of Death Allowance by Committee—Right of Administrator of Deceased Member to recover from Payee.*] The deceased, a member of an unregistered friendly society, had, upon making his application for admission to the society, signed a declaration agreeing to be bound by the rules of the society, and authorizing the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered and authorized the committee to pay the allowance to such person or persons as in their discretion they might think fit; and it further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it had been bequeathed; that, where there were no surviving relatives and no special bequest, only the funeral expenses should be defrayed by the society, and that where the allowance had been once paid neither the committee nor the society should be liable to any further claim in respect of it. Upon the death of the member intestate the society paid the amount of the death allowance to the defendant, his sister. The plaintiff, as administrator of the deceased, having brought an action against the defendant to recover the money so paid to her:—*Held*, that the rule constituted the contract between the member and the society as to the payment of the money; that the death allowance was not the property of the member during his life, and in the absence of a bequest by will was not assets for the payment of his debts, and that therefore the plaintiff could not recover. ASHBY *v.* COSTIN - - - - **401**

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4. —— *Affidavit—Accidental Omission of Residence, &c., of attesting Witness—Rectification of Omission—"The Register"—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 10, 12, 14.] Sect. 14 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), enacts that a judge, on being satisfied that the

BILL OF SALE—*continued.*
omission to register a bill of sale or the omission or misstatement of the name, residence, or occupation of any person, was accidental, or due to inadvertence, may in his discretion order such such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, &c., as he thinks fit to direct:—*Held* (affirming the judgment of the Queen's Bench Division) that the power of rectification given by the section is limited by the description of "register" in s. 12 of the Act, and therefore, where the affidavit filed with the registrar under s. 10, sub-s. 2, has by inadvertence omitted to describe the residence and occupation of an attesting witness, the judge has no power to allow a supplemental affidavit to be filed supplying such particulars.—The time for registration cannot be extended under the 14th section so as to defeat the vested right of an execution creditor. Crew *v.* Cummings - - C. A. 420

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See Municipal Corporation.

BUILDING SOCIETY—*Company—Winding-up Order—Voluntary Winding-up—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 32—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 101, 138, 165—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131).] A building society established under the Building Societies Act, 1874, may be wound up voluntarily under the Companies Acts, 1862 and 1867.—In such a winding-up a claim for the repayment of money lent to the defendant out of the funds of the society contrary to its rules may be made by summons. In re Sunderland 32nd Universal Building Society - - 349

2. —— *Borrowing without Powers—Subsequent Powers—Deposit Note for past Loan, Validity of—Estoppel—Building Societies Act*, 1847 (37 & 38 *Vict. c.* 42).] The directors of an unincorporated building society which had no borrowing powers borrowed money for the benefit of the society and gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave up to them the promissory notes above mentioned:—*Held*, that the deposit note was not

BUILDING SOCIETY—*continued.*
binding on the society. In re Companies Acts. Ex parte Watson - - - - 301

BURIAL BOARD—15 & 16 *Vict. c.* 85, *ss.* 33, 38—*Right of Burial, what included in—Erections on Grave—General Control of Burial Board.*] The defendants, a burial board, had provided a burial-ground under 15 & 16 Vict. c. 85. By s. 33 of that Act the burial board are empowered to sell the exclusive right of burial in any part of their burial-ground, the right of constructing any vault or place of burial, and also the right of erecting any monument, gravestone, tablet or monumental inscription in such burial-ground. By s. 38 the general management, regulation, and control of the burial-ground are vested in the burial-board.—For the purpose of burying a deceased daughter, the plaintiff purchased from the defendants, and they conveyed to him, "the exclusive right of burial" in a grave space in their burial-ground in perpetuity; and they also granted him the right to erect a gravestone on the grave. He afterwards placed upon the grave a wreath and, to protect it, a glass shade covered with a wire frame. It was the general rule of the defendants never to allow the placing of such glass shades on the graves in their burial-ground, and accordingly the defendants removed the glass shade and wire frame without the consent of the plaintiff:—*Held*, that the plaintiff had only acquired such rights as, under s. 33, the defendants were empowered to sell; that such rights did not include a right to place the glass shade and wire covering on the grave; and that, in the exercise of the control vested in them by s. 38, the defendants were entitled to remove the same. McGough *v.* The Lancaster Burial Board - - C. A. 323

CARRIER—Passenger—Ticket, failure to produce—Condition incorporated by ticket—Forcible removal from carriage—Assault—Licence—Easement - 207
See Railway Company. 3.

—— Railway company—Carriage of goods—Action for charges—Defence of unreasonableness - - - - 215
See Railway Company.

CASES—*Askew* v. *Lewis* (10 Q. B. D. 477) approved - - - - 405
See Bill of Sale. 3.

—— *Bank of Ireland, The* v. *Trustees of Evans' Charities* (5 H. L. C. 389) followed 160
See Estoppel.

—— *Beatson* v. *Skene* (5 H. & N. 838) discussed
See Practice. 4. [509

—— *Blackburn, Low & Co.* v. *Vigors* (17 Q. B. D. 553; 12 App. Cas. 531) considered 144
See Insurance (Marine).

—— *Crease* v. *Sawle* (2 Q. B. 862) followed 96
See Poor-rate.

—— *Davey* v. *Shannon* (4 Ex. D. 81) not followed - - - - 424
See Husband and Wife.

—— *Edmonton, Guardians of* v. *Guardians of St. Mary, Islington* (15 Q. B. D. 95, 339) overruled - - - - 88
See Poor Law. 2.

CASES—*continued.*

—— *Emmanuel & Co., In re* (9 Q. B. D. 408) considered - - - - 242
See SOLICITOR.

—— *Gandy* v. *Jubber* (5 B. & S. 78, 9 Ib. 15) discussed - - - - 398
See NUISANCE.

—— *Foster* v. *Usherwood* (3 Ex. D. 1) considered
See COUNTY COURT. 2. [15

—— *Hall* v. *Comfort* (18 Q. B. D. 11) disapproved - - - - 384
See BILL OF SALE. 2.

—— *Higgins, In re* (31 Ch. D. 142) discussed 461
See REVENUE. 8.

—— *Last* v. *London Assurance Corporation* (12 Q. B. D. 389; 14 Q. B. D. 239; 10 App. Cas. 438) considered - - 339
See REVENUE. 4.

—— *Lawson* v. *Vacuum Brake Co.* (27 Ch. D. 137) explained - - - 1
See PRACTICE. 8.

—— *Lord Advocate* v. *Roberts's Trustees* (20 Scotch Sess. Cas. 2nd Series, 449) followed 461
See REVENUE. 8.

—— *National Coffee Palace Co., In re. Ex parte Panmure* (24 Ch. D. 367), followed 126
See DAMAGES, MEASURE OF.

—— *Rex* v. *Leake* (5 B. & Ad. 469) approved and followed - - - - 273
See HIGHWAY.

—— *Scott* v. *Morley* (20 Q. B. D. 120) followed
See PRACTICE. 10. [11

—— *Shilson, Ex parte* (20 Q. B. D. 343) approved and followed - - - 75
See BANKRUPTCY. 12.

—— *Somerset* v. *Hart* (12 Q. B. D. 360) distinguished - - - - 249
See INN. 4.

—— *South Staffordshire Waterworks Co.* v. *Stone* (19 Q. B. D. 168) approved and followed
See JUSTICES. 2. [188

CANAL—Land acquired by canal company—Dedication as highway - - 273
See HIGHWAY.

CASE—Application to state—Justices—Practice—Summary Jurisdiction Act, 1879 188
See JUSTICES. 2.

CHARGING ORDER—Jurisdiction to make—Money standing to credit of judgment debtor in Chancery Division 226, 488
See PRACTICE. 13, 14.

COLLISION—Admiralty—Jurisdiction—County Court—Damage by collision - 13
See COUNTY COURT.

COMMISSION—Witness resident abroad—Practice
See PRACTICE. 8, 9. [1, 178

COMMISSIONER—Commissioner to administer oaths in Chancery—Registration of deeds—Middlesex - - - 555
See MIDDLESEX.

COMMISSIONERS OF WORKS AND PUBLIC BUILDINGS—Right to prohibit meetings—Trafalgar Square - - 191
See JUSTICES.

COMMITMENT—Form of order—County court
See COUNTY COURT. 4. [359

—— Warrant of—Governor of prison—Liability for false imprisonment - - 362
See PRISON.

COMPANY—Registrar of Joint Stock Companies—Refusal to file contract—Mandamus—Alternative remedy - - 131
See MANDAMUS.

—— Custody of seal—Negligence - - 160
See ESTOPPEL.

—— Winding-up order—Building society 349
See BUILDING SOCIETY.

COMPOSITION—Default in payment of—Adjudication of bankruptcy—Relation back of title of trustee - - - 580
See BANKRUPTCY. 9.

CONCEALMENT—Insurance, Marine—Principal and agent - - - - 144
See INSURANCE (MARINE).

CONSPIRACY—*Combination to keep up Rate of Freight—Engrossing particular Trade—Exclusion of Rival Traders from Combination.*] The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and in consequence of such exclusion, sustained damage:—*Held*, that the association, being formed by the defendants with the view of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for a conspiracy was maintainable. MOGUL STEAMSHIP COMPANY *v.* MCGREGOR, GOW, & CO. - 544

CONTEMPT—Punishment of contempt of Court—Imprisonment—Terms of order for discharge of prisoner - - 236
See PRACTICE. 15.

CORPORATION—Custody of seal—Negligence
See ESTOPPEL. [160

COSTS—Counter-claim—Counter-claim against third party—Trial by judge without jury—Discretion of judge - - 230
See PRACTICE. 11.

—— Taxation—Evidence procured before trial—Discontinuance - - - 199
See PRACTICE. 12.

—— Solicitor—Privilege—Action commenced in High Court—Costs—County Courts Acts, 1849 and 1867 - - 185
See SOLICITOR. 2.

—— County court—Scale of costs in action under 10*l.* - - - - - 242
See SOLICITOR.

COSTS—*continued.*

—— Reference by consent—Costs of negotiating and settling terms of reference—"Costs of reference" - - - 182
See ARBITRATION. 2.

—— Bankruptcy—Scale of costs where assets do not exceed 300*l.*—Taxation upon lower scale - - - - - 417
See BANKRUPTCY. 6.

—— Taxation—Solicitor and client—Solicitor to guardians—Taxation of costs by clerk of the peace - - - - 297
See POOR-RATE. 2.

COUNTER-CLAIM—Default in pleading to—Motion for judgment on counter-claim
See PRACTICE. 7. [10

—— Costs—Counter-claim against third party—Trial by judge without jury—Discretion of judge - - - - 230
See PRACTICE. 11.

COUNTY COURT — *Admiralty Jurisdiction — "Damage by Collision"—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 4.] Damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river is not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and a county court has not Admiralty jurisdiction in respect of such damage. ROBSON *v.* THE OWNER OF THE "KATE" - - - 13

2. —— *Power to remit Cause to County Court —Claim reduced below* 50*l. by payment under Rules of Supreme Court*, 1883, *Order* XIV., *r.* 4—*County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 26—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 7.] Payment by the defendant of part of the plaintiff's claim pursuant to a judgment under Order XIV., r. 4, is a reduction of such claim within s. 26 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), and when the claim is reduced by such payment to a sum not exceeding 50*l.*, the action may be remitted to a county court for trial.—*Foster* v. *Usherwood* (3 Ex. D. 1) considered. GRAY *v.* HOPPER - - 15

3. —— *Practice—Power to remit Action—Judgment under Order* XIV. *for Part of Claim—Reduction of Claim to a Sum not exceeding Fifty Pounds—"Payment, payment into court, admitted set-off, or otherwise"—County Courts Act*, 1856 (19 & 20 *Vict. c.* 108), *s.* 26—*County Courts Act*, 1875 (30 & 31 *Vict. c.* 142), *s.* 7.] Payment by the defendant of part of the plaintiff's claim pursuant to a judgment under Order XIV., r. 4, is a reduction of such claim within s. 26 of the County Courts Act, 1856, and when the claim is reduced by such payment to a sum not exceeding 50*l.*, the action may be remitted to a county court for trial.—Judgment of the Queen's Bench Division (ante p. 15) affirmed. GRAY *v.* HOPPER **C. A. 246**

4. —— *Practice — Commitment — Form of Order—Prohibition—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*County Court Rules*, 1886, *Order* II., *r.* 2, *Order* XXV., *r.* 33.] On the hearing of a judgment summons in a county court the judge committed the defendant, but suspended

COUNTY COURT—*continued.*

the order. The only written document which had been drawn up was in the books of the County Court, in the form given in the schedule to the County Court Rules, 1886, among the forms of books which, by Order II., r. 2, the registrar is directed to keep, headed "Book H.—Summonses for Commitment, Interpleader, and Minutes of Orders thereon."—The defendant applied for a prohibition on the ground that the order did not shew on its face the ground on which it was issued, as required by s. 5, sub-s. 1 (*a*), of the Debtors Act, 1869:—*Held*, that the minute of the order in Book H (which did not shew on its face the ground on which the order was issued) was not the order within the meaning of the Debtors Act, but that, as the order, if it were afterwards drawn up as directed by Order XXV., r. 33, of the County Court Rules, 1886, would sufficiently comply with the Act, the application for a prohibition must be refused. HARRIS *v.* SLATER **359**

—— Costs—Scale of costs in action under 10*l.*
See SOLICITOR. [242

—— Bankruptcy—Jurisdiction of judge to review order of registrar—Substitution of petitioning creditors - - 21
See BANKRUPTCY. 4.

COVENANT—To pay rent—Lease—Surrender by assignee of part of premises—Liability of lessee - - - - 101
See LANDLORD AND TENANT. 2.

CRIMINAL LAW—*Libel—Indictment for publishing Libel "knowing the same to be false"—Conviction for Publication only*—6 & 7 *Vict. c.* 96, *ss.* 4, 5.] On an indictment for publishing a defamatory libel "knowing the same to be false," the defendant may be convicted of merely publishing a defamatory libel. BOALER *v.* THE QUEEN - - - - - - 284

—— Metropolitan police courts—Money charged to have been fraudulently obtained—Jurisdiction to order delivery - 109
See JUSTICES. 3.

—— Bankruptcy—Debtor's petition—Statutable misdemeanors under Debtors Act, 1869—Jurisdiction of Court to order prosecution of bankrupt - - - 24
See BANKRUPTCY. 3.

CROWN—Disclaimer—Onerous property—Bankruptcy—Property held under the Crown
See BANKRUPTCY. 11. [380

CROWN PRACTICE — Proceedings on Crown side of Queen's Bench Division—Proceeding as pauper - - - 3
See PRACTICE. 16.

DAMAGES, MEASURE OF—*Principal and Agent —Warranty of Authority.*] The plaintiff brought an action in England against a marine insurance company carrying on business in the United States and obtained judgment in default of appearance for 1000*l.* Negotiations for a settlement then took place between the plaintiff and the defendants, the agents of the company in England, and the defendants by mistake represented to the plaintiff in good faith that they were authorized by the company to offer 300*l.* in settlement of the plaintiff's claim. The plaintiff, relying upon the

DAMAGES, MEASURE OF—*continued.*
accuracy of the representation, entered into an agreement with the defendants, on behalf of the company, for the settlement of his claim for 300*l.*, but it afterwards appeared that the defendants were not authorized to make the agreement, and he was unable to enforce the performance of it. In an action against the defendants to recover damages for breach of warranty of authority, the defendants paid into court a sum representing the expenses incurred by the plaintiff in negotiating the compromise:—*Held*, by Charles, J., on the authority of *In re National Coffee Palace Company, Ex parte Panmure* (24 Ch. D. 367), that the measure of damages was the loss by the plaintiff of the gain which he would have derived from the contract which the defendants warranted should be made, and that inasmuch as the judgment obtained by him was of no value (for the company had no assets in England, and the judgment could not under the circumstances be enforced in the American Courts), and the value of the plaintiff's remedy on the policy could not be estimated, the plaintiff was entitled to recover from the defendants 300*l.* in addition to the sum paid into Court. MEEK *v.* WENDT - - 126

DEDICATION—Highway—Land vested in company for statutory purposes - 273
See HIGHWAY.

DEFAMATION—Libel—Indictment for publishing libel knowing the same to be false—Conviction for publication only - 284
See CRIMINAL LAW.

—— Pleading—Evidence of plaintiff's bad reputation - - - - 501
See PRACTICE. 5.

DISCLAIMER—Lease—Bankruptcy—Sub-lease by way of mortgage—Vesting order
See BANKRUPTCY. 12. [475

—— Onerous property—Bankruptcy—Property held under the Crown - - 380
See BANKRUPTCY. 11.

DISCONTINUANCE—Costs—Taxation—Evidence procured before trial - 199
See PRACTICE. 12.

DISCOVERY—Privilege—Affairs of State 509
See PRACTICE. 4.

DISTRESS WARRANT—Poor-rate—Lands not in occupation of person assessed - 96
See POOR-RATE.

DOG—Order by a magistrate for delivery of dog to owner—"Goods" - - 433
See METROPOLIS.

EASEMENT—Licence—Assault—Forcible removal from railway carriage - 207
See RAILWAY COMPANY. 3.

ELECTION—Councillors—Municipal corporation—Nomination paper—Signature of assenting burgess - - - 309
See MUNICIPAL CORPORATION.

ESTOPPEL—*Negligence—Company—Custody of Seal—Loss by unauthorized use of Seal—Proximate Cause of Loss.*] The plaintiffs, a corporate body, left their seal in the custody of their clerk, who, without authority, affixed it to powers of attorney, under which certain stock in the public

ESTOPPEL—*continued.*
funds, the property of the plaintiffs, was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock on the ground that it had been transferred without their authority by the defendants:—*Held*, on the authority of *The Bank of Ireland* v. *Trustees of Evans' Charities* (5 H. L. C. 389), that assuming the plaintiffs had been negligent their negligence was not the proximate cause of the loss, and did not disentitle them from recovering in the action. MAYOR, &C., OF MERCHANTS OF THE STAPLE OF ENGLAND *v.* GOVERNOR AND COMPANY OF THE BANK OF ENGLAND - - - - C. A. 160

—— Building society—Borrowing without powers—Subsequent powers—Deposit note for past loan—Validity of - - 301
See BUILDING SOCIETY. 2.

EVIDENCE—Commission—Witness resident abroad - - - - 1, 178
See PRACTICE. 8, 9.

EXCISE—Penalty—Jurisdiction—Metropolitan magistrate - - - - 47
See REVENUE.

EXECUTION—Bankruptcy—Sale by sheriff—Retention of proceeds by sheriff - 472
See BANKRUPTCY. 8.

FALSE IMPRISONMENT—Prison—Governor of prison—Warrant of commitment—Action against governor for false imprisonment - - - - - 362
See PRISON.

FORFEITURE—Lease—Agreement for lease—Notice—Conveyancing and Law and Property Act, 1881 - - 289
See LANDLORD AND TENANT.

FRAUDS, STATUTE OF—Agreement not to be performed within one year—Agreement by husband to pay wife a weekly sum for maintenance - - - 424
See HUSBAND AND WIFE.

GAMING—Suffering gaming on licensed premises—Knowledge of servant in charge of premises—Ignorance of licensed person
See INN. 4. [249

GRAVE—Burial ground—Right to place glass shade - - - - 323
See BURIAL BOARD.

HIGHWAY—*Dedication, Power to make—Land vested in Company for Statutory Purposes.*] Land acquired by a company under an Act of Parliament for the purposes of their undertaking as specified by such Act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the Act.—Therefore, where land was acquired and used by a canal company under their statutes for the purposes of a towing-path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing-path by the company:—*Held* (affirming the decision of the Queen's Bench Division) that the company could dedicate the land as a public footpath subject to

HIGHWAY—*continued.*
its use by them as a towing-path.—*R.* v. *Leake* (5 B. & Ad. 469) approved and followed. GRAND JUNCTION CANAL COMPANY *v.* PETTY **C. A. 273**

HOSPITAL—Self-supporting institution for insane persons—Inhabited house duty **436**
See REVENUE. 3.

HUSBAND AND WIFE—*Agreement for Separation—Power of Husband and Wife to contract without the intervention of Trustee—Agreement not to be performed within a Year—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.] A husband and wife, having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children, and to indemnify the husband against any debts contracted by her. An action having been brought in the county court by the wife against the husband for six weeks' arrears of maintenance under the agreement:—*Held* (affirming the decision of the Queen's Bench Division), that the husband and wife had power to make a contract for separation without the intervention of a trustee, by way of compromise of legal proceedings, that the husband's contract to pay the wife a weekly sum for maintenance was binding, and that the action was maintainable:—*Held*, also, that the agreement was not an agreement "not to be performed within one year" within the 4th section of the Statute of Frauds, and therefore need not be in writing.—*Davey* v. *Shannon* (4 Ex. D. 81) not followed. MCGREGOR *v.* MCGREGOR **[C. A. 424**

—— Married woman—Judgment against in respect of separate estate—Married Women's Property Act, 1870—33 & 34 Vict. c. 93, s. 12, and 37 & 38 Vict. c. 50, s. 1
See PRACTICE. 10. **[11**

—— Married woman—Trade carried on separate from husband—Separate property **264**
See BANKRUPTCY. 7.

—— Poor law—Married woman deserted by husband who never had a settlement - **88**
See POOR LAW. 2.

INCOME TAX—Duty on income from lands—Deduction for cost of embankment to protect lands against encroachment from tidal river - - - - **444**
See REVENUE. 2.

—— Person resident in England—Trade carried on elsewhere than in England—Profits not remitted to England - - **52**
See REVENUE. 5.

—— Re-payment of—Computation of profits—"Shall find and prove within or at the end of the year of assessment" - **313**
See REVENUE. 6.

—— "Hospital"—Self-supporting institution for insane—Inhabited house duty - **436**
See REVENUE. 3.

—— Insurance company—Interest—Profits and gains—Chargeability of interest arising from investments made for the purpose of carrying on a business - - **339**
See REVENUE. 4.

INCUMBRANCES—Covenant against—Metropolis Management Acts—Apportionment of paving expenses - - **107**
See METROPOLIS MANAGEMENT ACTS.

INDICTMENT—Libel—Indictment for publishing libel knowing the same to be false—Conviction for publication only - **284**
See CRIMINAL LAW.

INFORMATION—Failure to disclose indictable offence—Decision of magistrate—Jurisdiction of High Court - - **191**
See JUSTICES.

INJUNCTION—Patent—Action for injunction against threats of legal proceedings—Comptroller General—Application for amendment of specification—Prohibition - - - - - **137**
See PATENT.

INN—*Licence—Renewal—Discretion of Justices with regard to Licence by Way of Renewal—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 1, 9, 13, 14, 27—*Licensing Act*, 1872 (35 & 36 *Vict.* *c.* 94), *ss.* 36, 40, 42, 74—*Licensing Act*, 1874 (37 & 38 *Vict.* *c.* 49), *s.* 26—*Beerhouse Act*, 1830 (1 *Wm.* 4, *c.* 64), *s.* 1—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict.* *c.* 27), *ss.* 4. 5, 7, 8.] The discretion of the justices as to granting or refusing a licence by way of renewal under the Licensing Act, 1828 (9 Geo. 4, c. 61), and the Licensing Acts, 1872 and 1874, is absolute, provided it be exercised judicially, and the situation of the house as regards police supervision and the requirements of the neighbourhood are matters which the justices have a right to consider in deciding whether to grant or refuse a licence by way of renewal under these Acts. SHARPE *v.* WAKEFIELD - - - **66**

2. —— *Licence—Renewal—Insertion of Condition in Licence—Renewal of Licence subject to Condition originally inserted—Six-Day Licence, Renewal of*—35 & 36 *Vict.* *c.* 94, *ss.* 42, 49.] Where a licence was originally granted subject to the condition under s. 49 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), requiring the licensed premises to be closed during the whole of Sunday, it can only be renewed subject to that condition, and cannot be renewed as an ordinary seven-day licence. THE QUEEN *v.* LICENSING JUSTICES OF CREWKERNE - - - - **C. A. 85**

3. —— *Licensing Acts—Renewal of Licence—Conviction—Forfeiture of Licence—Discretion of Justices to refuse Transfer—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict.* *c.* 27), *ss.* 8, 19—*Licensing Act*, 1872 (35 & 36 *Vict.* *c.* 94), *s.* 15—*Licensing Act*, 1874 (37 & 38 *Vict.* *c.* 49), *s.* 15.] A licence existing on May 1, 1899, for the sale of beer to be consumed on the premises was forfeited by the conviction of the holder under the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 15, for permitting the premises to be used as a brothel:—*Held*, that the licence was not "in force" within the meaning of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, and that the licensing justices at special sessions had a general discretion to refuse applications by the landlord and a new tenant of the premises for a transfer of the licence, and were not limited to the four grounds of refusal specified in s. 8. THE QUEEN *v.* JUSTICES OF THE WEST RIDING - - - - - **258**

INN—*continued.*

4. —— *Offences—Suffering Gaming on Licensed Premises—Knowledge of Servant in charge of Premises—Ignorance of Licensed Person—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.] Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person who was in charge of the premises, but without any knowledge or connivance on the part of the licensed person:—*Held*, that the licensed person had suffered gaming to be carried on on the premises within the meaning of s. 17 of the Licensing Act, 1872, and was rightly convicted.—*Somerset* v. *Hart* (12 Q. B. D. 360) distinguished. BOND *v.* EVANS - - 249

INSURANCE (LIFE)—Benefit society—Death of member intestate—Payment of death allowance by committee—Right of administrator of deceased member to recover from payee - - - 401
See BENEFIT SOCIETY.

—— Income tax—Interest—Profits and gains—Chargeability of interest arising from investments made for the purpose of carrying on a business - - 339
See REVENUE. 4.

INSURANCE (MARINE)—*Concealment of Material Facts—Principal and Agents.*] The plaintiffs, underwriters in Glasgow, employed there a firm of insurance brokers to reinsure a ship which was overdue. The brokers received information tending to shew that the ship, as was the fact, was lost. Without communicating this information to the plaintiffs, they telegraphed in the plaintiffs' name to their own London agents, stating the rate of insurance premium which the plaintiffs were prepared to pay. Communications followed between the plaintiffs and the London agents, and the London agents, through a firm of London insurance brokers, effected a policy of re-insurance at a higher rate of premium, which policy was underwritten by the defendant:—*Held*, that the policy was void on the ground of concealment of material facts by the agents of the assured.—*Blackburn, Low & Co.* v. *Vigors* (17 Q. B. D. 553; 12 App. Cas. 531) considered. BLACKBURN *v.* HASLAM - - - 144

INTEREST — Revenue — Income tax — Chargeability of interest arising from investments made for the purpose of carrying on business - - - - 339
See REVENUE. 4.

JOINT PETITION — Bankruptcy — Debtors not joint traders—Separate adjudication 17
See BANKRUPTCY.

JUDGMENT—Motion for—Counter-claim—Default in pleading to - - 10
See PRACTICE. 7.

JUDGMENT SUMMONS—Commitment—Form of order—Prohibition - - - 359
See COUNTY COURT. 4.

JUSTICES—*Practice—Information not disclosing Indictable Offence—Refusal to issue Summons—Rule against Justices—*11 *&* 12 *Vict. c.* 44, *s.* 5—*Trafalgar Square—Right to occupy for Public Meeting—Commissioners of Works—Power to prohibit Meetings—*7 *&* 8 *Vict. c.* 60.] Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Court of Justice has no jurisdiction to review his decision, either as to law or as to fact, and therefore in such a case a rule, under 11 & 12 Vict. c. 44, s. 5, calling upon the magistrate to shew cause why he should not hear and determine the application for a summons, will not be granted.—*Semble*, per WILLS and GRANTHAM, JJ. There is no right on the part of the public to occupy Trafalgar Square for the purpose of holding public meetings, but the Commissioners of Works and Public Buildings (in whom the care, control, management, and regulation of the square is vested by 7 & 8 Vict. c. 60, s. 2, and 14 & 15 Vict. c. 42, s. 22), have power to prohibit the holding of such meetings there. EX PARTE LEWIS [191

2. —— *Practice—Case, Application to state—Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 33—*Summary Jurisdiction Rules*, 1886, *r.* 18.] There is no right of appeal from justices by case stated under the Summary Jurisdiction Act, 1879, s. 33, unless the directions of the rules made under that section with regard to the mode of application for a case have been observed.—Therefore in a case where no notice of application for the case in writing had been given to the justices making the order appealed against, though a notice of application in writing had been served on their clerk:—*Held*, that there was no power to state a case, and that the appeal must be dismissed.—*South Staffordshire Waterworks Co.* v. *Stone* (19 Q. B. D. 168) approved and followed. LOCKHART *v.* MAYOR, &C., OF ST. ALBANS C. A. 188

3. —— *Metropolitan Police Courts—Money charged to have been fraudulently obtained, Jurisdiction to order delivery of—*2 *&* 3 *Vict. c.* 71, *s.* 29—*Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 44.] By 2 & 3 Vict. c. 71, s. 29, "if any money or goods charged to be stolen or fraudulently obtained shall be in the custody of any constable by virtue of any warrant of a justice, or in prosecution of any charge of felony or misdemeanor in regard to the obtaining thereof, and the person charged with stealing or obtaining possession as aforesaid shall not be found, or shall have been summarily convicted or discharged, or shall have been tried or acquitted, or if such person shall have been tried and found guilty, but the property so in custody shall not have been included in any indictment upon which he shall have been found guilty, it shall be lawful for any magistrate to make an order for the delivery of such goods or money to the party who shall appear to be the rightful owner thereof."—An accused person, having been arrested by a police constable, was taken to a police station, where she was searched, and a sum of 108*l.* was found upon her and taken possession of by the police. In the charge-sheet kept at the police station the following charge against her was entered:—"Fraudulently obtaining on the 10th instant the sum of 5*s.* from Miss M., and also the sum of 5*s.* from Miss B., by representing that she (the prisoner) was collecting subscriptions for the children's treat of St. Peter's, Eaton Square, and further with endeavouring to procure charitable contribu-

JUSTICES—*continued.*
tions by false pretences." On the following day she was brought before a metropolitan police magistrate, who had the charge-sheet before him, and convicted her summarily in respect of the two first offences specified therein, and sentenced her to two consecutive terms of imprisonment. At the hearing, in addition to Miss M. and Miss B., three other ladies were called who proved that she had obtained from them various small sums, amounting to about 2*l.* 5*s.*, by making similar fraudulent representations:—*Held*, upon those facts, that the money found upon the prisoner was not money "charged" before the magistrate to be stolen or fraudulently obtained within the meaning of s. 29, and therefore that he had, after the conviction, no jurisdiction to make an order under that section for the delivery to her of the whole of the 108*l.* by the constable in whose custody it had remained.—BY THE COURT: The word "charged" in s. 29 is used in its technical legal sense, and imports a formal charge made before a magistrate against an accused person of having stolen or fraudulently obtained specific goods or money, which charge the accused is called upon to answer, and is given an opportunity of answering. THE QUEEN *v.* D'EYNCOURT - - 109

—— Metropolitan magistrate — Jurisdiction — Penalty—Excise - - 47
See REVENUE.

—— Inn—Discretion of justices with regard to licence by way of renewal - 66
See INN.

—— Jurisdiction—Poor-rate—Distress warrant
See POOR-RATE. [96

LANDLORD AND TENANT—*Lease—Agreement for Lease—Forfeiture—Notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.] An agreement for a lease is not a lease within the meaning of the 14th section of the Conveyancing and Law of Property Act, 1881, and therefore the terms of that section do not apply to a mere tenancy under an agreement for a lease, where there is no actual lease in existence, nor any title to specific performance.—The defendant in an action for recovery of land was in possession of the premises as tenant under an agreement for a lease, which provided that the lease to be executed thereunder should contain (inter alia) a covenant to keep the premises in repair and a condition for re-entry for breach of such covenant.—Rent had been paid under the agreement but no lease had been executed. The premises being out of repair the landlord brought the action to recover them as upon a forfeiture. No notice had been given before action under the above-mentioned section:—*Held*, that, there being no lease in fact executed or title shewn to a decree for specific performance by execution of a lease, the section did not apply, and the action was maintainable.—*Quære*, whether the section would have applied, if there had been a right to specific performance. SWAIN *v.* AYRES - C. A. 289

2. —— *Assignment—Surrender by Assignee of Part of Premises—Covenant to pay Rent—Liability of Lessee.*] The plaintiff demised a house and premises for a term of years by deed containing a

LANDLORD AND TENANT—*continued.*
covenant by the lessee to pay the rent reserved. The lessee assigned the term, and the assignee surrendered a small portion of the premises, upon which was a scullery, to the plaintiff who, in consideration therefor, paid the assignee 25*l.* and built for him a new scullery of equal value upon another part of the premises. The value of the premises was not lessened, nor were they substantially altered, by reason of the surrender:—*Held*, upon those facts, that the lessee was still liable upon his covenant to pay the rent. BAYNTON *v.* MORGAN - - - - 101

—— Nuisance—Weekly tenancy—Liability of reversioner - - - - 398
See NUISANCE.

—— Bankruptcy—Disclaimer of lease by trustee—Sub-lease by way of mortgage—Vesting order - - - - 475
See BANKRUPTCY. 12.

LEASE—Agreement for lease—Forfeiture—Notice—Conveyancing and Law of Property Act, 1881 - - - 289
See LANDLORD AND TENANT.

LEVEL CROSSING—Obligation to maintain gates—Negligence - - - - 524
See RAILWAY COMPANY. 2.

LIBEL—Criminal Law—Indictment for publishing libel "knowing the same to be false"
See CRIMINAL LAW. [284

—— Defence—Pleading—Evidence of plaintiff's bad reputation - - - 501
See PRACTICE. 5.

LICENSING ACTS — *Intoxicating Liquors—Licence—Theatre—Place of Public Entertainment—5 & 6 Wm. 4, c. 39, s. 7—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 3, 72, 74.] By 5 & 6 Wm. 4, c. 39, s. 7, it shall be lawful for the Commissioners of Excise to grant retail licences to any person to sell beer, wine, and spirits "in any theatre established under a royal patent, or any theatre or place of public entertainment licensed by the Lord Chamberlain or by justices of the peace," without the production by the applicant of any certificate or authority for him to keep a common inn, ale-house, or victualling-house.—By the Licensing Act, 1872, s. 3, no person shall sell any intoxicating liquor without being duly licensed, or at any place where he is not authorized by his licence to sell the same, under specified penalties, and by s. 74 "license" means a licence for the sale of intoxicating liquors granted by justices under the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts.—By s. 72: "Nothing in this Act shall affect or apply to" (inter alia) "the sale of intoxicating liquors by proprietors of theatres in pursuance of the Acts in that behalf:"—*Held*, that, since the passing of the Licensing Act, 1872, the Commissioners had no power to grant an excise licence, under 5 & 6 Will. 4, c. 39, s. 7, to the proprietors of a place of public entertainment licensed by justices for music and dancing under 25 Geo. 2, c. 36, and having no justices' licence or certificate for the sale of intoxicating liquors. THE QUEEN *v.* COMMISSIONERS OF INLAND REVENUE - - - - - - 569

LICENSING ACTS—*continued.*

—— Inn—Discretion of justices with regard to licence by way of renewal - - 66
See INN.

—— Licence—Renewal—Renewal of licence subject to six days' licence - - 85
See INN. 2.

—— Renewal of licence—Conviction—Forfeiture of licence — Discretion of justices to refuse transfer - - - 258
See INN. 3.

—— Suffering gaming on licensed premises—Knowledge of servant in charge of premises—Ignorance of licensed person
See INN. 4. [249

LIMITATIONS—Guardians of the poor acting as rural sanitary authority - - 447
See LOCAL GOVERNMENT ACTS.

LOCAL GOVERNMENT ACTS—*Guardians of the Poor acting as Rural Sanitary Authority—Limitations*—22 & 23 *Vict. c.* 49, *s.* 1—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 9.] Sect. 1 of the Act 22 & 23 Vict. c. 49, enacts that any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards.—By s. 9 of the Public Health Act, 1875, the guardians of a rural union shall form the rural sanitary authority of that district, and "all statutes, orders, and legal provisions applicable to any board of guardians shall apply to them in their capacity of rural authority under this Act for purposes of this Act."—*Held*, that s. 9 of the Public Health Act, 1875, does not extend the limitation of time imposed by s. 1 of the previous Act to debts contracted by guardians in their capacity of rural authority, but that that limitation still remains applicable only to debts contracted by guardians as such. DEARLE *v.* GUARDIANS OF PETERSFIELD UNION - - - - - C. A. 447

2. —— *Officer of Local Authority—Contract with Local Authority—Allowance in addition to Salary—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 189, 193, 326.] By the terms of contracts entered into with a local authority for the purpose of the Public Health Act, 1875, the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts he should certify to be due to such contractors respectively by the local authority:—*Held* (affirming the judgment of Mathew, J.), that in respect of each contract the surveyor was liable to a penalty as having been "concerned or interested" therein within the meaning of s. 193 of the Public Health Act, 1875.—A local authority employed their surveyor, apart from his ordinary duties, to superintend the construction of certain drainage works as their engineer, and agreed to remunerate him by a percentage on the outlay:—*Held* (affirming the judgment of Mathew, J.), that the surveyor was liable to the penalty imposed by s. 193 of the Public Health Act, 1875. WHITELY *v.* BARLEY - - - - - C. A. 154

MAGISTRATE—Metropolis—Detention of goods—Order for delivery of dog to owner 433
See METROPOLIS.

MANDAMUS—*Alternative Remedy—Registrar of Joint Stock Companies—Refusal to file Contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *ss.* 18, 19, 20.] An application was made for a mandamus to compel the Registrar of Joint Stock Companies to file, under s. 25 of the Companies Act, 1867, a contract which he had refused to file on the ground that it was insufficiently stamped:—*Held*, that the proper mode of questioning the legality of the registrar's refusal was by obtaining the opinion of the Commissioners of Inland Revenue, and appealing from their decision to the High Court, under ss. 18, 19, and 20 of the Stamp Act, 1870, and therefore, as there was another appropriate remedy, a mandamus must be refused. THE QUEEN *v.* REGISTRAR OF JOINT STOCK COMPANIES - - - - - - 131

—— Jurisdiction of Income Tax Commissioners—Repayment of income tax - 313
See REVENUE. 6.

MASTER AND SERVANT—Negligence—Defect in condition of machinery—Employers' Liability Act, 1880 - - 371
See NEGLIGENCE. 3.

—— Negligence—Person intrusted with superintendence—Employers' Liability Act, 1880 - - - - - 367
See NEGLIGENCE. 4.

MAYOR'S COURT, LONDON—Prohibition—Application after judgment—Discretion
See PROHIBITION. [533

MEETING—Right of public meeting—Trafalgar Square — Commissioners of Works—Power to prohibit meetings - 191
See JUSTICES.

METROPOLIS—*Police Acts—Police Magistrate—Jurisdiction—Order for delivery of Goods—Dog*—2 & 3 *Vict. c.* 71, *s.* 40.] A dog is "goods" within the meaning of 2 & 3 Vict. c. 71, s. 40, and therefore a Metropolitan Police Magistrate has jurisdiction under that section to order a dog to be delivered to its owner. THE QUEEN *v.* SLADE - - - - - - 433

METROPOLIS MANAGEMENT ACTS—*Paving Expenses*—25 & 26 *Vict. c.* 102, *s.* 77—*Payment by Purchaser of Property—Implied Coveuant against Incumbrances—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A*).] The expenses of paving a new street apportioned under s. 77 of the Metropolis Management Amendment Act, 1862, are not a charge upon the property in respect of which they are payable, and therefore if the owner sells the property while the expenses are unpaid, and conveys as beneficial owner, and the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of s. 7, sub-s. 1 (A) of the Conveyancing and Law of Property Act, 1881. EGG *v.* BLAYNEY [107

MIDDLESEX—*Registration of Deeds—Middlesex Registration Act* (7 *Anne, c.* 20), *ss.* 1, 5, 17—*Deed of Enfranchisement—Witness to Memorial—Oath taken before London Commissioner to administer Oaths in Chancery.*] A deed of enfranchisement of copyholds in Middlesex is not within the exception of copyhold estates in the Middlesex Registration Act (7 Anne, c. 20), s, 17, and must be registered.—So held by the Court of Appeal, affirming the decision of Lord Coleridge, C.J., and Mathew, J.—By s. 5 of the Act the memorial of deeds required to be registered (under s. 1) shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, attested by two witnesses, one whereof is to be one of the witnesses to the execution of such deed, which witness shall upon his oath before one of the registrars or before a master in Chancery ordinary or extraordinary, prove the signing and sealing of the memorial and the execution of the deed mentioned in such memorial.—On application to register a memorial of a deed of enfranchisement it appeared that one of the witnesses to such memorial was a witness to the execution of the deed by the grantee, but that neither of them was a witness to the execution by the grantor:—*Held* by the Court of Appeal, affirming the decision of Stephen and Wills, JJ., that such witness was one of the witnesses to the execution of the deed within the meaning of s. 5, and that the memorial was duly attested.—It further appeared that the oath of the attesting witness was taken before a London commissioner to administer oaths in Chancery, appointed under 16 & 17 Vict. c. 78:—*Held*, affirming the decision of Stephen and Wills, JJ., that the oath had been duly administered. THE QUEEN *v.* THE REGISTRAR OF DEEDS FOR THE COUNTY OF MIDDLESEX - C. A. 555

MONOPOLY—Combination to keep up rate of fre[illegible]—Engrossing particular trade—Exclu[illegible] of rival traders from combination - - - - - 544
See CONSPIRACY.

MORTGAGE—Attornment clause—Bill of sale
See BILL OF SALE. 2. [384

MUNICIPAL CORPORATION—*Election of Councillors—Nomination Paper—Signature of assenting Burgess—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50.] By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), Third Schedule, Elections, Part II., Rules as to Nomination in Election of Councillors: 1. Every candidate for the office of councillor must be nominated in writing. 2. The writing must be subscribed in the case of a ward election by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination. — A nomination paper at a ward election was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the burgess roll were entered the names "Edwin John Hooper," "William E. Waller," and "Robert Turner," the numbers opposite these names on the burgess roll being the same as those appearing opposite the signature of the assenting burgesses on the nomination paper:—*Held*, that the nomination paper had been duly subscribed by the assenting burgesses. BOWDEN *v.* BESLEY - - - - 309

NEGLIGENCE—*Liability—Railway Company—Dangerous Premises — Injury to Passenger — Knowledge of Nature and Extent of Danger—"Volenti non fit Injuria."*] The plaintiff was injured by falling on steps leading to the defendants' railway station, which the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used, and he admitted that he knew that the steps were dangerous, and went down carefully holding the handrail:—*Held*, that the defendants had not shewn that the plaintiff with a full knowledge of the nature and extent of the danger had voluntarily agreed to incur it, so as to make the maxim "Volenti non fit injuria" applicable, and therefore he was entitled to recover. OSBORNE *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - 220

2. —— *Railway Company—Locomotive Engine at Station—Noise of Steam.*] In an action against the defendants, a railway company, it appeared that the plaintiffs were leaving a station belonging to the defendants in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station which was blowing off steam, and the carriage was upset and the plaintiffs injured. It did not appear that the engine was defective or that it was used in an improper manner, or that the approach to the station was inconvenient, but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident:—*Held*, by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ. (Fry, L.J., doubting), that the defendants were not liable, as there was no evidence of any obligation on their part to screen the railway from the road. SIMKIN *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - C. A. 453

3. —— *Master and Servant—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1, *s.* 2, *sub-s.* 1—*Defect in Condition of Machinery—Dangerous Machine.*] The mere fact that a machine is dangerous to a workman employed to work with it does not shew that there is a defect in the condition of the machine within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1, inasmuch as by s. 2, sub-s. 1, of the Act the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service intrusted by him with the duty of seeing that the machine is in proper condition.—The plaintiff in an action under the Employers' Liability Act, 1880, was employed by the defendants to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which while in motion the plaintiff had to place a band. The disc of the wheel had holes in it, and, while the plaintiff was putting on the band, his thumb slipped through one of these holes, the result being that it was caught between the wheel and the bed-plate of the machine and cut off. It was proved that, though these wheels were sometimes made without such holes, they were very commonly made with them, the object being to reduce the weight of the wheel and consequent friction. In the

NEGLIGENCE—*continued.*
defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously arisen with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine because it had never entered into his head that it was dangerous:—*Held*, by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting, that there was no evidence of any defect in the machine implying negligence in the defendants or any one in their service, and therefore that the defendants were not liable. WALSH *v.* WHITELEY - C. A. 371

4. —— *Master and Servant—Person intrusted with Superintendence—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-ss.* 2, 3; *s.* 8.] In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. B. was himself a labourer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way:—*Held*, that the plaintiff was not entitled to recover, as B. was not a person who had superintendence intrusted to him within s. 1, sub-s. 2, as defined by s. 8, nor was there any evidence that the injury resulted from the plaintiff having conformed to any order of B. within s. 1, sub-s. 3, assuming that B. was a person to whose orders the plaintiff was bound to conform.—Judgment of the Queen's Bench Division (19 Q. B. D. 585) affirmed. KELLARD *v.* ROOKE [C. A. 367

—— Railway company—Level crossing—Obligation to maintain gates - - 524
See RAILWAY COMPANY. 2.

—— Corporation—Custody of seal - - 160
See ESTOPPEL.

NEGOTIABLE SECURITY—Trover—Holder for value - - - - 535
See TROVER.

NUISANCE—*Reversioner, Liability of—Landlord and Tenant—Weekly Tenancy—Injury caused by defective Repair of demised Premises.*] The plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shewn to have been in existence at the commencement of the tenancy, had existed for nearly two years before the accident:—*Held*, that, having regard to the nature of the tenancy, there had been a reletting of the premises after the nuisance was created and that the defendant, as reversioner, was liable.—*Gandy* v. *Jubber* (5 B. & S. 78, 9 Ib. 15) discussed. SANDFORD *v.* CLARKE - - - - 398

OFFICIAL RECEIVER—Disclaimer of property—Court fees—Different persons included in one application - - - 261
See BANKRUPTCY. 10.

PATENT—*Action for Injunction against Threats of Legal Proceedings—Cross-Action for Infringement—Application by Patentee in Cross-Action for leave to apply to amend Specification by way of Disclaimer—"Pending Legal Proceeding"—Prohibition—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 32.] By s. 18, sub-s. 1, of the Patents, Designs and Trade Marks Act, 1883, "a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification . . . by way of disclaimer, correction or explanation. . . ."—By s. 18, sub-s. 10: "The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending."—By s. 19: "In an action for infringement of a patent and in a proceeding for revocation of a patent the Court or a judge may order that a patentee shall . . . be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer. . . ."—An action having been commenced under s. 32 of the Patents, Designs and Trade Marks Act, 1883, for an injunction to restrain patentees from issuing threats of legal proceedings and for damages, the patentees brought a cross-action for infringement of their patent. The patentees then applied in the cross-action and obtained a judge's order under s. 19 giving them liberty to apply to the Comptroller-General of Patents for leave to amend their specification by way of disclaimer. Upon an application for a writ of prohibition to the Comptroller-General to prevent him from hearing the application upon the order:—*Held*, that the judge had jurisdiction to make the order, notwithstanding that the action under s. 32 had not been concluded, and that the application for a prohibition must be refused. IN RE HALL - - 137

PAUPER—Proceeding as pauper—Proceedings on Crown side of Queen's Bench Division - - - - - - 3
See PRACTICE. 16.

PAYMASTER-GENERAL — Charging order — Money standing to credit of judgment debtor in Chancery Division 226, 488
See PRACTICE. 13, 14.

PAYMENT INTO COURT—Defence setting up tender — Denial of liability—Continuance of action—Payment out of Court
See PRACTICE. 6. [202

PENALTY—Local Government Acts—Officer interested in contract with local authority
See LOCAL GOVERNMENT ACTS. 2. [154

—— Metropolitan magistrate — Jurisdiction — Excise - - - - 47
See REVENUE.

PLEADING—Defence—Libel—Evidence of plaintiff's bad reputation - - 501
See PRACTICE. 5.

—— Counter-claim — Default in pleading to — Motion for judgment - - 10
See PRACTICE. 7.

POOR LAW—*Settlement—Residence as Wife and Widow—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35.] A pauper had resided with her husband in a parish continuously for upwards of three years and continued after her

POOR LAW—*continued.*
husband's death to reside as a widow in the same parish for three months:—*Held*, affirming the judgment of the Queen's Bench Division, that the pauper had by such residence gained a settlement in the parish under s. 34 of the Divided Parishes Act, 1876.—By Lord Esher, M.R., and Lindley, L.J., Lopes, L.J. dissenting as to the construction of s. 34. GUARDIANS OF MEDWAY UNION *v.* GUARDIANS OF BEDMINSTER UNION - **C. A. 278**

2. —— *Settlement—Married Woman deserted by Husband who never had a Settlement—Retention of Settlement taken from Parent by Child under Sixteen—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] A female pauper had married when above the age of sixteen, and had been deserted by her husband, who never had a settlement: she had never acquired a settlement of her own:—*Held* (affirming the judgment of the Queen's Bench Division), that the pauper retained the derivative settlement which she had taken from her father while under the age of sixteen.—*Guardians of Edmonton* v. *Guardians of St. Mary, Islington* (15 Q. B. D. 95, 339), overruled. GUARDIANS OF DORCHESTER UNION *v.* GUARDIANS OF POPLAR UNION - - - **C. A. 88**

—— Guardians—Limitations - - **447**
See LOCAL GOVERNMENT ACTS.

POOR RATE—*Distress Warrant—Rate for Lands not in occupation of Person assessed—Jurisdiction and Discretion of Justices.*] Upon a summons before justices to enforce a poor-rate against a railway company, it appeared that property occupied by the company had been assessed by the description "offices and land with rails," but that in estimating the amount of the rate the overseers had treated certain buildings as being in the occupation of the company which were not in fact in their occupation. The company had not appealed against the rate:—*Held*, that the objection being matter of appeal and the rate good on the face of it, the justices were bound to issue a distress warrant.—*Crease* v. *Sawle* (2 Q. B. 862) followed. OVERSEERS OF POOR OF MANCHESTER *v.* HEADLAM - - - - **96**

2. —— *Practice—Costs—Solicitor and Client—Solicitor to Guardians—Taxation of Costs by Clerk of the Peace—Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *ss.* 32, 35, 39—*Attorneys and Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37.] A solicitor employed by guardians of the poor is entitled, notwithstanding that his bill of costs has been taxed by the clerk of the peace under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 39, to an order for taxation as between solicitor and client under the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37. GUARDIANS OF THE POOR OF SOUTHAMPTON *v.* BELL AND TAYLER - - - - - **297**

PRACTICE—*Notice of Writ—Service out of the Jurisdiction—"Proper" Parties—Order XI., r.* 1 (*g*).] By Order XI., r. 1, service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever (*g*) "Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."—In an action

PRACTICE—*continued.*
against defendants in London for breach of warranty of authority it appeared that they had assumed as agents for foreign principals to enter into a contract to be performed out of the jurisdiction, and that there had been a breach out of the jurisdiction, the supposed principals having repudiated the contract as being made without their authority:—*Held* (affirming the judgment of the Queen's Bench Division), that the foreign principals were "proper" parties to the action within Order XI., r. 1 (*g*), and that service on them out of the jurisdiction of notice of the writ might be allowed. MASSEY *v.* HEYNES **C. A. 330**

2. —— *Service out of Jurisdiction—Defendant Foreigner residing Abroad—Service of Writ on Defendant—Nullity—Order XI., r.* 6; *Order LXX., rr.* 1, 2.] By Order XI., r. 6, "when the defendant is neither a British subject nor in British dominions, notice of the writ and not the writ itself is to be served upon him."—The plaintiffs sued the defendant, who was a foreigner residing in France, for goods sold and delivered to him in England, and obtained a judge's order for the service upon him of the writ out of the jurisdiction, the order being obtained upon an affidavit which stated erroneously that the defendant was a British subject. The writ was served upon the defendant in France, and judgment signed against him in default of appearance:—*Held*, that the service of the writ instead of a notice was a nullity, and not a mere irregularity, and that the order for service of the writ and all subsequent proceedings must be set aside. HEWITSON *v.* FABRE - - **6**

3. —— *Specially indorsed Writ — Bond — Penalty—Orders III., r.* 6; *XIII., rr.* 3, 14; *XIV., r.* 1—8 & 9 *Wm.* 3, *c.* 11, *s.* 8.] The indorsement on a writ claimed 500*l.*, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 26*l.* during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid:—*Held*, that the plaintiff was not entitled to proceed under Order XIV., r. 1, to obtain final judgment, but was limited to the procedure specified in 8 & 9 Wm. 3, c. 11, s. 8, and Order XIII., r. 14. TUTHER *v.* CARALAMPI - - - - - - **414**

4. —— *Production of Documents—Privilege—Affairs of State—Affidavit — Sufficiency—Order XXXI., rr.* 12, 13, 14.] An action for libel was brought by the governor of a colony, the alleged libel consisting in a statement made by the defendant in a newspaper that the plaintiff, as governor, had sent to the Secretary of State for the Colonies garbled accounts of certain proceedings in the colonial assembly. The defendant pleaded that the statement was true. On an application for discovery by the defendant the plaintiff in his affidavit specified certain documents to the production of which he objected, as follows: "I have in my custody, but acquired and held by me in my capacity of Her Majesty's Governor of M. and subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of copies of various dispatches, reports, and other communications, with the enclosures referred to therein, which passed either between

PRACTICE—*continued.*

Her Majesty's Secretary of State for the Colonies and myself as such governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty to inquire into the affairs of M. and myself as such governor as aforesaid, or between the said Royal Commissioner and the said Secretary of State. The attention of the said Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents, and to object to their production in these proceedings on the ground of the interest of the state and of the public service. In consequence of those instructions and of the rules and regulations of Her Majesty's Colonial Service I am unable to produce the said documents, and I object to produce them on the ground aforesaid." No affidavit or statement was made on behalf of the Secretary of State in support of the objection.—*Held*, that it sufficiently appeared that the documents in question were privileged from discovery, and that the application must be refused.—*Beatson* v. *Skene* (5 H. & N. 838) discussed. HENNESSY *v.* WRIGHT [509

5. —— *Pleading—Defence—Libel—Evidence of Plaintiff's bad Reputation—Facts on which Defendant relies for Defence—Defence or Denial as to Damages—Rules of Supreme Court*, 1883, *Order* XIX., *rr.* 4, 15; *Order* XXI., *r.* 4.] The plaintiff, a professional jockey, sued to recover damages for a libel charging him with unfairly and dishonestly riding the horses in a particular stable.—The defendant pleaded a justification, and afterwards applied to amend his defence by adding a paragraph alleging that at the date of the publication the plaintiff was commonly reputed to have been in the habit of unfairly and dishonestly riding horses in races, so as to prevent them from winning:—*Held* that, as general evidence of the plaintiff's bad reputation (if admissible) could only be given in reduction of damages, and not in answer to the action, the paragraph did not contain a statement of material facts on which the defendant relied for his defence, within the meaning of Order XIX., r. 4, or a ground of defence which must be raised under Order XIX., r. 15, but was a denial or defence as to damages claimed or their amount, within the meaning of Order XXI., r. 4, and therefore ought not to be pleaded, and leave to amend must be refused. WOOD *v.* THE EARL OF DURHAM - - 501

6. —— *Payment into Court—Defence setting up Tender—Denial of Liability—Payment out of Court to Plaintiff's Solicitor—Liability of Solicitor to refund—Order* XXII., *rr.* 5, 6.] In an action for wrongful dismissal, claiming a year's salary in lieu of notice, the defendant pleaded that the plaintiff was only entitled to one month's notice; or, in the alternative, three months'; that before action the defendant made tender of three months' salary, which the plaintiff refused; that the defendant had paid the amount into court, and that it was enough to satisfy the plaintiff's claim. The request for lodgment in court contained a statement that the money was paid in with a defence setting up tender.—The plaintiff's solicitor, without obtaining an order, but on the written authority of the plaintiff, took the money out of court, and

PRACTICE—*continued.*

the plaintiff proceeded with the action. At the trial judgment was given for the defendant on the ground that the plaintiff was only entitled to one month's salary. The defendant applied for an order against the solicitor to refund so much of the money taken out of court as represented the difference between one month's and three months' salary.—The solicitor had acted bonâ fide in taking the money out of court, and had paid it over to the plaintiff before the application to make him refund it was made:—*Held*, that, although the plaintiff ought not to have had the money out of court, because a defence of tender of the sum paid in could not be pleaded to a claim for unliquidated damages, yet under the circumstances the solicitor ought not to be ordered to refund it. DAVYS *v.* RICHARDSON - - - C. A. 202

7. —— *Counter-claim—Default in Pleading to—Motion for Judgment on Counter-claim—Order* XXVII., *r.* 11.] Where a plaintiff fails to deliver a defence to a counter-claim, and his action is dismissed under a master's order, judgment on the counter-claim can only be signed by the defendant upon a motion for judgment under Order XXVII., r. 11. HIGGINS *v.* SCOTT - 10

8. —— *Evidence Abroad—Commission—Rules of Supreme Court*, 1883, *Order* XXXVII., *r.* 5.] Where material witnesses are resident abroad the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence, does not disentitle such party to an order for a commission.—*Lawson* v. *Vacuum Brake Company* (27 Ch. D. 137) explained. COCH *v.* ALLCOCK & Co. - - 1

9. —— *Evidence Abroad—Commission—Rules of Supreme Court*, 1883, *Order* XXXVII., *r.* 5—*Discretion.*] A party is not entitled to a commission ex debito justitiæ upon shewing that a material witness is resident out of the jurisdiction. The granting of the commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case.—In a case where it was shewn that witnesses were out of the jurisdiction and their examination on commission abroad would be much less expensive than bringing them to the trial in England, and there was nothing to shew that their presence in court was essential, the Court of Appeal affirmed the order of the Queen's Bench Division that the commission should issue. COCH *v.* ALLCOCK - - - - C. A. 178

10. —— *Married Woman—Judgment against, in respect of Separate Estate—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 12—*Married Women's Property Act* (1870) *Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *s.* 1—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13, 41, 22—*Rules of Supreme Court*, 1883, *Order* XIV., *r.* 1.] In an action against husband and wife to recover a debt of the wife contracted before marriage, where the marriage has taken place after the coming into operation of the Married Women's Property Act, 1870, and the Married Woman's Property Act (1870) Amendment Act, 1874, but before the coming into operation of the Married Women's Property Act, 1882, judgment may be entered against the wife under Order XIV., r. 1, making the debt and costs pay-

PRACTICE—*continued.*

able out of her separate property, with a limitation as regards execution similar to that in the form settled in *Scott* v. *Morley* (20 Q. B. D. 120, at p. 132), without proof of the existence of separate estate at the date of the judgment. Downe *v.* Fletcher - - - - - - 11

11. —— *Costs—Counter-claim—Counter-claim against Third Party — Trial by Judge without Jury—Discretion of Judge—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Supreme Court*, 1883, *Order* xxi., *rr.* 11, 12, 13, 14—*Order* lxv., *r.* 1.] In an action by landlord against tenant for rent, the defendant brought a counter-claim against the plaintiff and third parties for illegal distress. The judge, before whom the case was tried without a jury, gave judgment for the plaintiff on the claim and the counter-claim, but for the defendant against the third parties for 2*l.* 5*s.* "with such costs as the defendant would be entitled to by law":—*Held*, that as the case had been tried without a jury, the costs were by Order lxv., r. 1, in the discretion of the judge, and, there having been no exercise of such discretion in favour of the defendant as against the third parties, the defendant was not "entitled by law" to costs.—*Semble per* Huddleston, B., and Charles, J., that when the counter-claim is against a person not a party to the action, s. 24, sub-s. 3, of the Judicature Act, 1883, and Order xxi., rr. 11, 12, 13, and 14, do not render s. 5 of the County Courts Act, 1867, applicable to such a counter-claim. Lewin *v.* Trimming - - - - - - 230

12. —— *Costs—Taxation—Evidence procured before Trial—Discontinuance—Order* lxv., *r.* 27, *sub-r.* 9.] By Order lxv., r. 27, special allowances in respect of (sub-rule 9) "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence," shall apply to all taxations in the Supreme Court:—*Held*, that under this rule a master had a discretion to allow charges and expenses properly incurred by the defendant in procuring evidence where the plaintiff, having given no notice of trial, subsequently discontinued the action. Windham *v.* Bainton - - - - 199

13. —— *Charging Order—Jurisdiction to make —Money standing to Credit of Judgment Debtor in Chancery Division*—1 & 2 *Vict. c.* 110, *s.* 14—3 & 4 *Vict. c.* 82, *s.* 1—*Rules of the Supreme Court*, 1883, *Order* xlvi., *rr.* 1, 3—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.] Under Order xlvi., rr. 1, 3, a charging order may be made on cash standing to the credit of the judgment debtor in the name of the Paymaster-General. Brereton *v.* Edwards - - 226

14. —— *Charging Order — Jurisdiction — Order charging Cash—Cash standing to credit of Debtor in Chancery Division — Priority —Stop Order—Date from which Charging Order takes effect*—1 & 2 *Vict. c.* 110, *ss.* 12, 14—3 & 4 *Vict. c.* 82, *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7—*Rules of Supreme Court*, 1883, *Order* xlvi., *rr.* 1, 3—*Supreme Court Funds Rules*, 1886, *r.* 99.] A charging order may be made by a judge of the Queen's Bench Division upon cash standing to the credit of the debtor in the Chancery Division in the name of the Paymaster-General. — Such an order may be made ex parte, and in order to give effect to it it is not necessary to obtain a stop order or to obtain the appointment of a receiver; but notice given to the Paymaster-General will be sufficient to secure priority.—A charging order nisi, when it is afterwards made absolute, takes effect from the date of the order nisi.—Decision of the Queen's Bench Division (ante, p. 226) affirmed on different grounds. Brereton *v.* Edwards [C. A. 488

15. —— *Contempt of Court — Punishment of Contempt of Court by Imprisonment—Terms of Order for Discharge of Prisoner.*] The defendant was in custody for contempt of Court under the following circumstances. In 1877, she had brought an action for the recovery of some houses which she supposed to be her property. It was decided that she had no title, but between this date and 1886 she continued to assert her claim by legal proceedings, and attempted to take forcible possession of the premises. In 1885 an injunction was obtained by the plaintiff restraining the defendant and her agents from further molesting the owner and tenants of the estate; but she, notwithstanding, again endeavoured to take possession, and was in consequence, in December, 1886, imprisoned for contempt of Court. She was informed when sent to prison that if she would undertake to abandon her claim and to abstain from further efforts to take possession of the premises, she would be released. She refused to give this undertaking, and in consequence remained in custody till June, 1888:—*Held* (in June, 1888), that the defendant might be discharged from custody on the terms of an order which had been assented to by the counsel for the plaintiff, and which was read in her presence. —The terms of the order were that the injunction should continue for the term for which the plaintiff held the premises, and that in order to prevent any breach of the injunction by the defendant, a copy of the order should be given to the owner with a view to his obtaining the assistance of the police, should the defendant again attempt to obtain possession; that in case of any breach of the injunction the official solicitor should, upon the application of the plaintiff, take the necessary steps to bring the offenders before the Court and to enforce performance of the order; that the defendant should not be allowed to issue any writ or summons, or make any application or motion without the leave of a judge at chambers, and that, should notice of any application or motion be given without such leave, the official solicitor might be informed by letter, and the respondent should not be required to appear unless the Court should otherwise order. In re Maria Annie Davies - - - 236

16. —— *Prohibition — Proceedings on Crown Side of Queen's Bench Division—Proceeding as Pauper — Rules of Supreme Court*, 1883, *Order* xvi., *r.* 22; *Order* lxviii., *rr.* 1, 2.] A party to proceedings on the Crown side of the Queen's Bench Division cannot be admitted to proceed as a pauper. Mulleneisen *v.* Coulson (No. 8.) 3

PRACTICE—*continued.*

—— Arbitration — Power to revoke submission *See* ARBITRATION. [408

—— Costs — Reference by consent — Costs of negotiating and settling terms of submission—Costs of reference - 182
See ARBITRATION. 2.

—— Costs — Taxation — Solicitor and client — Solicitor to guardians — Taxation of costs by clerk of the peace - 297
See POOR-RATE. 2.

—— County Court—Power to remit action—Reduction of claim to sum not exceeding 50*l.* - - - - 246
See COUNTY COURT. 3.

—— Justices—Information not disclosing indictable offence—Refusal to issue summons—Rule against justices - - 191
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—— Justices—Application to state case—Summary Jurisdiction Act, 1879 - 188
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—— Prohibition—Judgment summons—Commitment—Form of order - - 359
See COUNTY COURT. 4.

—— Solicitor—Privilege—Action commenced in High Court—Costs—County Court Acts, 1849 and 1867 - - - 185
See SOLICITOR. 2.

PRINCIPAL AND AGENT — Concealment — Insurance, Marine - - - 144
See INSURANCE (MARINE).

—— Damages—Measure of—Warranty of authority - - - - - 126
See DAMAGES, MEASURE OF.

PRISON—*Governor of Prison—Warrant of Commitment — Action against Governor for False Imprisonment—Protection of Warrant—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 5, 21, 29—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *s.* 12.] The governor of a prison is protected in obeying a warrant of commitment valid on the face of it, and an action for false imprisonment will not lie against him for the detention of a prisoner in pursuance of the terms of such warrant. The plaintiff having been convicted by a court of summary jurisdiction and sentenced to seven days' imprisonment, a warrant of commitment was issued directing that the plaintiff should be imprisoned in a certain gaol for seven days. The plaintiff was arrested on August 24, and lodged in prison on August 25. The governor of the gaol kept the plaintiff in prison until and during August 31:—*Held*, that, whether or not the plaintiff's sentence ran from August 24 or 25, the governor was protected by the warrant, and was not liable to an action for false imprisonment in respect of the plaintiff's detention on August 31. HENDERSON *v.* PRESTON [C. A. 362

PRIVILEGE—Production of documents—Affairs of State - - - - 509
See PRACTICE. 3.

—— Solicitor—Action commenced in High Court—Costs—County Courts Acts, 1849 and 1867 - - - - - 185
See SOLICITOR.

PROHIBITION — *Application after Judgment — Discretion to refuse Writ of Publication*] The granting of a writ of prohibition to an inferior Court that has exceeded its jurisdiction is discretionary. Prohibition to the Mayor's Court, London, in a case in which that Court had exceeded its jurisdiction, refused on an application made after judgment, but before execution. IN THE MATTER OF A PROHIBITION IN THE MAYOR'S COURT OF LONDON. BROAD *v.* PERKINS C. A. 533

—— Comptroller-General — Application for amendments of specification - 137
See PATENT.

—— Judgment summons—Commitment—Form of order - - - - 359
See COUNTY COURT. 4.

—— Metropolitan police magistrate — Money charged to have been fraudulently obtained, jurisdiction to order delivery of *See* JUSTICES. 3. [109

—— Proceedings on Crown side of Queen's Bench Division—Proceeding as pauper *See* PRACTICE. 16. [3

PROMISSORY NOTE—Stamp duty—Agreement *See* REVENUE. 7. [352

PROSECUTION — Bankrupt — Bankruptcy on debtor's petition - - - 24
See BANKRUPTCY. 3.

RAILWAY— Negligence—Liability—Dangerous premises—Injury to passenger—Knowledge of nature and extent of danger—Volenti non fit injuria - - 220
See NEGLIGENCE.

—— Negligence—Locomotive engine at station—Noise of steam - - - 453
See NEGLIGENCE. 2.

RAILWAY COMPANY—*Carriage of Goods — Action for Charges—Defence of Unreasonableness —Overpayments in respect of Unreasonable Charges —Set-off—Counter-claim — Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 6.] It is no defence to an action by a railway company to recover charges for the carriage of goods that the charges sued for are unreasonable, so as to give an undue preference to other persons, or to subject the defendant to undue prejudice or disadvantage, within the meaning of s. 2 of the Railway and Canal Traffic Act, 1854, nor can the defendant in such an action set off, or recover by counter-claim, overpayments in respect of previous charges which were unreasonable within that section. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY *v.* GREENWOOD - - 215

2. —— *Level Crossing—Obligation to maintain Gates—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 47.] By s. 47 of the Railways Clauses Consolidation Act, 1845, "If a railway cross any public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith . . . and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and

RAILWAY COMPANY—*continued.*

such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway."—In an action against a railway company for not properly fencing their line at a level crossing according to s. 47, whereby horses belonging to the plaintiff strayed on to the line and were killed, it appeared that there were gates at the level crossing of the full width of the road properly so called, but that a swing gate had been placed by the defendants upon a piece of land beyond the limit of the road, on the same line with the gates, for the convenience of foot passengers using the crossing. The plaintiff's horses after straying from his land arrived at the gates at the level crossing, and finding them closed, turned aside to the swing gate, and, forcing their way through it, owing to the defective condition of the posts, got on to the line and were killed by a passing train:—*Held*, that there was evidence of a breach of the defendants' obligation under s. 47 to fence in the railway from the road, and that they were liable. Charman *v.* South-Eastern Railway Company [C. A. 524

3. —— *Passenger—Ticket, failure to produce—Condition incorporated by Ticket—Forcible Removal from Carriage—Assault—Licence—Easement.*] The plaintiff was a passenger by the defendants' railway. The ticket issued to him incorporated by reference certain conditions published in the defendants' time-tables, one of which was that every passenger should shew and deliver up his ticket to any duly authorized servant of the company, when required to do so for any purpose, and any passenger travelling without a ticket, or failing, or refusing to shew or deliver up such ticket as aforesaid, should be required to pay the fare from the station whence the train originally started. The plaintiff having lost the ticket was unable to produce it when required to do so during the journey by one of the defendants' servants. The plaintiff was thereupon required to pay the fare from the station whence the train started, and, on his declining to do so, was forcibly removed by the defendants' servants from the carriage in which he was travelling, no more force, however, being used than was necessary for his removal. He thereupon sued the defendants for assault:—*Held*, that the contract between the plaintiff and the defendants did not by implication authorize the defendants to remove the plaintiff from the carriage on his failing to produce a ticket and refusing to pay the fare as provided by the condition; that the defendants were not justified in so removing him; and that the action was therefore maintainable. Butler *v.* Manchester, Sheffield, and Lincolnshire Railway Company - - - C. A. 207

RECEIPT—Bill of sale—Document not constituting contract—Oral agreement by which title given - - - - 41
See Bill of Sale.

REGISTRATION—Middlesex - - 555
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—— Renewal of—Bill of sale - - 405
See Bill of Sale. 3.

REMITTED ACTION—County court—Claim reduced below 50*l.* by payment under Order xvi. - - - - 15
See County Court. 2.

—— County court—Claim reduced to sum not exceeding 50*l.* by payment under Order xvi. - - - - - 246
See County Court. 3.

REVENUE—*Excise—Penalty—Metropolitan Magistrates—Jurisdiction*—15 & 16 *Vict. c.* 61, *s.* 1—*Customs and Inland Revenue Act*, 1887 (50 & 51 *Vict. c.* 15), *s.* 4.] By 15 & 16 Vict. c. 61, s. 1, an information "for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, and incurred for or by reason of any offence committed against any such Act or Acts," may be heard and determined, if the offence has been committed within the limits of the chief office of Inland Revenue in London, before a metropolitan police magistrate:—*Held*, that the provisions of the section applied to informations for penalties imposed by statute in respect of excise offences created after the passing of the Act, and therefore that a metropolitan police magistrate had jurisdiction to hear and determine an information for the recovery of the penalty imposed by s. 4 of the Customs and Inland Revenue Act, 1887, in respect of the new excise offence created by that section. The Queen *v.* Ingham - - - - - 47

2. —— *Income Tax—Duty on Income from Lands—Deduction for Cost of Embankment to protect Lands against Encroachment of Tidal River—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *Schedule A., s.* 37.] By the Income Act, 1853 (16 & 17 Vict. c. 34), s. 37, in charging the duty under Schedule A. in respect of lands a deduction is to be made for the amount expended by the owner on an average of the twenty-one preceding years in the making or repairing of sea-walls or other embankments "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river."—The appellant was assessed to the income tax under Schedule A. in respect of the annual value of certain lands. These lands had prior to 1880 been salt marshes adjoining a tidal river, which were liable to be flooded at every tide, and had a small yearly value as pasturage. The appellant began in 1880 to construct an embankment for the purpose of excluding the water from these lands, which was complete in 1885, and the lands were by the construction of such embankment converted into valuable inclosed lands, of much greater value than in their previous state as salt marshes:—*Held* (affirming the judgment of the Queen's Bench Division) that the appellant was not entitled to any deduction under s. 37 on the ground that the embankment constructed by him was not "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river," within the meaning of the section, inasmuch as the section did not apply to embankments made for the improvement of the land by altering its condition, but only to embankments made for its protection or preservation in its existing state. Hesketh *v.* Bray - - - C. A. 444

REVENUE—*continued.*

3. —— *Income Tax—Inhabited House Duty—Exemptions—"Hospital"—Self-supporting Institution for Insane—5 & 6 Vict. c. 35, s. 61, rule No. VI.; 48 Geo. 3, c. 55, Sched. B., Case IV.*] By 5 & 6 Vict. c. 35, s. 61, rule No. VI., allowances in respect of property tax levied under Sched. A. of the Income Tax Acts are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse in respect of the public buildings . . . and for the repairs of such hospital, public school, or almshouse . . . and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and maintained by the funds of such hospital, school, on almshouse . . . Or on the rents and profits of lands," &c., "belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes."—By 48 Geo. 3, c. 55, Sched. B., Exemptions, Case IV.: "Any hospital, charity school, or house provided for the reception or relief of poor persons" is exempt from the inhabited house duty.—An institution for the reception of insane persons was founded by charitable donations, but unendowed. It was vested in trustees and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some less than the cost of their maintenance, and a few were maintained gratuitously. After paying expenses there was an annual surplus of profits which was expended in enlarging and improving the institution:—*Held*, that the institution being wholly self-supporting was not exempt as a "hospital" within the meaning of either 5 & 6 Vict. c. 35, s. 61, rule No. VI., or 48 Geo. 3, c. 55, Sched. B., Case IV., which must be restricted to hospitals maintained wholly or in part by charity. NEEDHAM *v.* BOWERS [436

4. —— *Income Tax—Interest—Profits and Gains—Chargeability of Interest arising from Investments made for the Purpose of carrying on a Business—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 163—*Income Tax Act*, 1823 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedules C and D.*] The amount of interest arising from investments made by an insurance company for the purpose of carrying on their business on which income tax had been deducted at its source amounted to more than the profits of the company for the year of assessment, but the company had during the year received interest from investments on which income tax had not been deducted at its source:—*Held*, that under s. 102 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and Sched. D of s. 2 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the company were liable to pay income tax on the interest from which income tax had not been deducted at its source.—*Last* v. *London Assurance Corporation* (12 Q. B. D. 389; 14 Q. B. D. 239; 10 App. Cas. 438) considered. CLERICAL, MEDICAL AND GENERAL LIFE ASSURANCE SOCIETY *v.* CARTER [339

5. —— *Income Tax—Person resident in England—Trade carried on elsewhere than in England—Profits arising or accruing—Profits not remitted to England—5 & 6 Vict. c.* 35, *ss.* 100, 106, 108—

REVENUE—*continued.*

16 & 17 *Vict. c.* 34, *s.* 2, *Sched. D.*] The respondent, who resided wholly in England, was a partner in a firm carrying on business solely in Melbourne, Australia. Profits were made by the firm, and a portion of the respondent's share thereof was remitted to him in England and returned by him for assessment to the income tax under Schedule D. The larger portion of his share of the profits of the firm was not remitted to him in England, but was left in Australia. The appellant contended that the respondent was liable in respect of the whole of his share of the profits, whether received by him in England or not, as being profits or gains arising or accruing to him while residing in the United Kingdom from a trade carried on elsewhere, within the meaning of 16 & 17 Vict. c. 34, s. 2, Sched. D.:—*Held* (by Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), that the respondent was not liable to income tax in respect of that portion of his profits which did not reach him in England. COLQUHOUN *v.* BROOKS - - - **C. A. 52**

6. —— *Income Tax—Repayment of Income Tax—Computation of Profits—Time within which Overpayment must be proved—Jurisdiction of Income Tax Commissioners—5 & 6 Vict. c.* 35, *s.* 133—*"At the end of the year"—Mandamus.*] By 5 & 6 Vict. c. 35, s. 133, "if within or at the end of the year" of assessment any person charged with income tax under Schedule D. "shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made that his profits during such year for which the computation was made fell short of the sum so computed," &c., it shall be lawful for the said Commissioners to cause the assessment to be amended as the case shall require and, in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for Special Purposes the amount of the sum overpaid upon such first assessment, and thereupon the last-mentioned Commissioners shall issue an order for the repayment of such sum as shall have been so overpaid, &c.—An English company, working mines abroad, made, in March, 1887, an application under the above section for certificates in respect of overpayments of income tax assessed on profits for the years ending respectively April 5, 1884, and April 5, 1885, and the Commissioners by whom the assessments were made having inquired into the case gave them certificates under the section. The Commissioners for Special Purposes refused to issue orders for repayment on such certificates on the ground that they were made without jurisdiction, the company not having found and proved "within or at the end of the year" as required by the section that their profits in the respective years fell short of the sum computed:—*Held*, that the certificates given were valid: and that mandamus lay to compel the Commissioners for Special Purposes to issue orders for repayment of the amounts certified to be overpaid.—The expression "at the end of the year" in the above section does not mean at any time after the end of the year, or, on the other hand, within any limit of time generally applicable, but as soon after the end of the year as, having regard to the circumstances of the particular case, is practicable by the use of

REVENUE—*continued.*

due exertions.—By LORD ESHER, M.R. The Commissioners by whom the assessment was made are given by the section jurisdiction finally to determine whether the discovery and proof of the profits having fallen short of the sum computed has been made within the period specified in the section as above interpreted.—By LINDLEY, L.J. The Commissioners by whom the assessment was made having granted the certificate under the section, the onus of shewing that such discovery and proof were not made within the period above mentioned, and that the certificate was therefore invalid, rested on the Commissioners for Special Purposes, and was not satisfied by the mere fact of the application for the certificate not having been made before the date when it was made in the present case. THE QUEEN *v.* COMMISSIONERS FOR SPECIAL PURPOSES OF THE INCOME TAX [C. A. 313

7. —— *Stamp Duty — Promissory Note — Agreement—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 49.] In order that a document may be a promissory note within s. 49 of the Stamp Act, 1870, it must substantially contain a promise to pay a definite sum of money and nothing more. A document containing a promise to pay money as part of a contract containing other stipulations would not be a promissory note within the Act.—By an instrument, described as a policy of insurance, after reciting that E. was desirous of being insured with the appellant corporation, and that there had been paid to the corporation the sum of 9*l.* 17*s.* 4*d.*, being the agreed premium for such assurance, it was witnessed that the corporation did thereby guarantee to the assured payment of the sum of 100*l.* on May 18, 1967; provided that, if the assured should be desirous at any time of surrendering the policy, the corporation would allow to him the surrender value thereof as on May 18 last preceding the date of his notice to surrender, such value to be fixed according to the tables of the corporation for the time being in force with reference to surrenders:—*Held*, affirming the judgment of the Queen's Bench Division, that this instrument was liable to stamp duty as an agreement, and not as a promissory note within s. 49 of the Stamp Act, 1870. MORTGAGE INSURANCE CORPORATION *v.* COMMISSIONERS OF INLAND REVENUE - - C. A. 352

8. —— *Succession Duty — "Disposition of Property"—16 & 17 Vict. c.* 51, *ss.* 1, 2, 16.] By deed making provision for an endowment the donor covenanted that he or his executors or administrators after his death would transfer certain Bank stock and certain shares into the names of trustees, and by another deed of the same date he declared that the trustees should stand possessed of the stock and shares upon trust for certain charitable purposes. By a subsequent deed he covenanted that he, or his executors or administrators after his death, would transfer a further amount of Bank stock into the names of the trustees, and declared that they should stand possessed of it on the same trusts. After the death of the donor, his executors transferred the stock and shares into the names of the trustees:—*Held*, that the deeds shewed a "disposition of property" within s. 2 of the Succession Duty Act, 1853

REVENUE—*continued.*

(16 & 17 Vict. c. 51), and that the stock and shares so transferred were chargeable with succession duty.—*Lord Advocate* v. *Roberts's Trustees* (20 Scotch Sess. Cas. 2nd Series, 449) followed.—*In re Higgins* (31 Ch. D. 142) discussed. ATTORNEY-GENERAL *v.* MONTEFIORE - - 461

9. —— *Succession Duty—Power of Appointment—Acceleration of Succession by Extinction of prior Interests—16 & 17 Vict. c.* 51, *ss.* 2, 15, 34.] By s. 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), "where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."—By a marriage settlement the trust funds were settled upon trust to pay the income to the husband for life, and upon his death to the wife for life if she should survive, with remainder to the children of the marriage as the husband and wife jointly, or the survivor of them, should appoint, and in default of such appointment for the children who should attain the age of twenty-one, or die leaving issue, or marry, in equal portions. It was also provided that it should be lawful for the trustees during the joint lives of the husband and wife, or the life of the survivor, with their, his, or her consent in writing, and after the decease of both, at the discretion of the trustees, to raise and apply, or dispose of, all or any part of the then expectant part or share of any such child or issue whose share should not then be payable, for or towards the preferment, advancement or benefit of such child or issue.—During the lives of the tenants for life portions of the trust funds were appointed and paid over to the children by the trustees under the power in the settlement:—*Held*, on the death of the surviving tenant for life, that as to the appointed part of the trust fund, there had been an acceleration of the title to the succession "by the extinction of prior interests" within 16 & 17 Vict. c. 51, s. 15, and that such part was, equally with the unappointed part, subject to succession duty. EX PARTE SITWELL. IN RE DRURY LOWE'S MARRIAGE SETTLEMENT 466

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